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Supreme Court, U.S.
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In The

Supreme Court Of The United States

BRIAN K. MURPHY,
Petitioner,

v.

BERNALE BRYANT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

CONNECTICUT COMMISSIONER OF CORRECTION'S PETITION FOR WRIT OF CERTIORARI WITII ATTACHED APPENDIX

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QUESTION PRESENTED

Whether the Connecticut Supreme Court misapplied United States Supreme Court precedent and improperly overturned a conviction for a brutal homicide by ignoring *Strickland v. Washington*'s strong admonition to assess counsel's performance with appropriate deference and, instead found that counsel's performance was deficient based entirely on speculation and conjecture?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

RELEVANT CONSTITUTIONAL PROVISIONS ... 2

RELEVANT RULES OF THE
UNITED STATES SUPREME COURT 3

STATEMENT OF THE CASE 4

A. The Respondent's Criminal Trial 5

B. The Hearing on the Respondent's Habeas Corpus Petition 10

C. Appellate Review of the Habeas Court's Decision 17

1. Decision of the Connecticut Appellate Court 17

2. Decision of the Connecticut Supreme Court 19

REASONS FOR GRANTING THE WRIT 23

A. The Connecticut Supreme Court Failed to Afford Appropriate Deference to Decisions Made by Respondent's Counsel 26

B. Failure to Afford Appropriate Deference to Trial Counsel in Other States 29

CONCLUSION 32

PETITIONER'S APPENDIX

Bernale Bryant v. Commissioner of Correction, 290 Conn. 502 (2009) A-1

Court Order Denying Commissioner's Motion for Reconsideration and Reargument En Banc A-31

TABLE OF AUTHORITIES

Page

CASES

Aillon v. Meachum, 211 Conn., 352, 559 A.2d 206 (1989) 10

Anfinson v. State, 758 N.W. 2d 496 (Iowa 2008) 25, 29

Bloom v. Vasquez, 840 F. Supp. 1362 (C.D. Cal.1993) 26

Bryant v. Commissioner of Correction, 290 Conn. 502, 964 A.2d 1186 (2009) . . . . . passim

Bryant v. Commissioner of Correction, 99 Conn. App. 434, 914 A.2d 585 (2007) . . . . . passim

Commonwealth v. Hill, 432 Mass. 704, 739 N.E.2d 670 (2000) 25, 30, 31

Dunkley v. Commissioner of Correction, 73 Conn. App. 819, 810 A.2d 281 (2002), cert. denied, 262 Conn. 953, 818 A.2d 780 (2003) 20

Matter of Maxfield, 133 Wash.2d 332, 945 P.2d 196 (1997) 25, 31

Siripongs v. Calderon, 133 F.3d 732 (9th Cir.), cert. denied, 525 U.S. 839, 115 S.Ct. 1175, 130 L.Ed.2d 1127 (1998) 26

State v. Bryant, 71 Conn. App. 488, 802 A.2d 224, cert. denied, 261 Conn. 939, 808 A.2d 1133 (2002) . 10

State v. Drakeford, 261 Conn. 42, 802 A.2d 844 (2002) 10

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, reh. denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984) . . . . . passim

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 27

STATUTES

28 U.S.C. 1257 2

Connecticut General Statutes § 53a-54a 5

Connecticut General Statutes § 53a-55 . . . . . 3, 4, 10

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution 2, 10, 23, 26

Fourteenth Amendment to the United States Constitution 2

Article First, § 8, of the Constitution of the State of Connecticut 6, 10

:OURT RULES

upreme Court Rule 10 . . . . . 2, 3

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Brian K. Murphy, acting Commissioner of Correction for the State of Connecticut, respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on March 10, 2009.[1]

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[1] When this case was litigated in state court, the Commissioner of Correction for the State of Connecticut was Theresa Lantz. Commissioner Lantz retired on June 30, 2009 and the petitioner herein, Brian K. Murphy, was appointed to serve as acting Commissioner of Correction effective July 1, 2009.

OPINION BELOW

The opinion of the Connecticut Supreme Court reported as *Bryant v. Commissioner of Correction*, 290 Conn. 502 (2009) reh'g denied (April 21, 2009), which reversed the decision of the Connecticut Appellate Court and upheld the state habeas court's ruling granting the respondent habeas corpus relief, is the subject of this petition. The opinion and the state supreme court's order denying reconsideration and reargument are reprinted in the appendix.

JURISDICTION

The decision below was released on March 10, 2009. The petitioner's motion for reconsideration and and reargument en banc was denied on April 21, 2009. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 10(c).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "[N]o State shall ... deprive any person of life, liberty or property without due process of law...."

RELEVANT STATUTORY PROVISIONS

Connecticut General Statutes § 53a-55(a)(1) provides, in pertinent part, as follows:

> A person is guilty of manslaughter in the first degree when ... with intent to cause serious physical injury to a person, he causes the death of such person....

RELEVANT RULES OF THE UNITED STATES SUPREME COURT

Rule 10 provides, in pertinent part, as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. Any petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> ***
>
> (c) a state court ... has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

STATEMENT OF THE CASE

In *Bryant v. Commissioner of Correction,* supra, the respondent was convicted of manslaughter in the first degree, in violation of Connecticut General Statutes § 53a-55(a)(1), for stomping his victim to death in a "drug deal gone bad." The evidence in the case showed that the victims drove off without paying for their drugs, but collided with another vehicle as they fled. The respondent dragged both victims from the wreck and stomped them, killing one and injuring the other. When questioned by the police, the respondent admitted being at the scene of the accident, but denied assaulting the victims. His statement suggested that the injuries suffered by the deceased victim were the result of the collision. The respondent was convicted at trial because the massive blunt trauma suffered by the deceased victim was not consistent with an injury sustained in an automobile accident and was obviously the result of a beating. In addition, the surviving victim and a bystander testified that they saw the respondent stomping the deceased victim. Finally, forensic evidence, including DNA analysis of blood from the victim that was sprayed on the front grill of the car, corroborated the eyewitness testimony.

In his habeas corpus petition, the respondent claimed that his defense counsel was ineffective in failing to present a defense that the victim was killed by being shot in the head by an unknown gunman. There were numerous problems with this defense, including the fact that: (1) the autopsy did not show a bullet wound to the victim's head or anywhere else on his body; (2) the theory of defense was inconsistent with the

respondent's statements to the police and his testimony at trial; (3) no one at the scene, including the respondent, reported seeing anyone with a gun; and (4) the theory provided no explanation for the massive blunt trauma injuries suffered by the victim. Nevertheless, the habeas court found defense counsel ineffective and granted a new trial.

The Commissioner of Correction appealed and the Connecticut Appellate Court reversed the judgment of the habeas court. *Bryant v. Commissioner of Correction*, 99 Conn. App. 434, 444 (2007). After granting the respondent's petition for certification to appeal, however, the Connecticut Supreme Court reversed the decision of the Appellate Court and restored the habeas court's order granting a new trial. *Bryant v. Commissioner of Correction*, 290 Conn. at 527.

A. The Respondent's Criminal Trial

The respondent was charged with murder, in violation of Connecticut General Statutes § 53a-54a, in connection with the death of Edward Jones. At the respondent's trial, Gary Fournier testified that during the early morning hours of April 14, 1996, he and Jones decided to steal cocaine from drug dealers working in the vicinity of Irving Street and Albany Avenue in Hartford. Fournier and Jones planned to obtain the drugs and drive off without paying for them. T. at 608-11.[2] Fournier and Jones drove to Irving Street and were approached by a drug dealer named Terry Davis. Davis

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[2] T. refers to the transcript of the petitioner's trial in *State v. Bernale Bryant*, CR00-0540873, Judicial District of Hartford.

then backed away from the car and they were approached by the respondent. At that point, Fournier, who was driving the car, engaged in a drug transaction with the respondent. T. at 611-12.

When the respondent handed Fournier the drugs, he drove off without paying for them. The respondent grabbed onto the car and ran down the street with it until he dropped off as Fournier drove through the stop sign at Albany Avenue. When Fournier's car entered the intersection, it collided with a sport utility vehicle (SUV), spun around and struck a telephone pole. T. at 614-15. After the accident, the respondent dragged Fournier out of the car, pushed him to the ground and kicked him. Fournier testified that after kicking him for about fifteen seconds, the respondent went back to the car and dragged Jones out. Fournier then went to a nearby building and sat on the steps. From that location, Fournier watched the respondent beat and kick Jones at the front of the car. T. at 616-18.

Fournier's testimony was corroborated by Ewan Sharp, a witness to the incident. At the hearing in probable cause, Sharp testified that at the time of the incident, he was on the corner of Magnolia Street and Albany Avenue, one block from Irving Street.[3] Sharp testified that he heard the sound of squealing tires and looked in the direction of Irving Street. When he did so, he saw a car proceeding from Irving Street onto Albany

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[3] Article First, § 8, of the Connecticut Constitution provides that "[n]o person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law...."

Avenue. Sharp saw a man fall off the car and roll into the street. The car was struck by another vehicle that was traveling on Albany Avenue. The collision caused the car to spin around and strike a telephone pole. Sharp recognized the man who fell off the car as the respondent. T. at 925-30, 943-49.

Sharp testified that he ran to Irving Street after the collision. When he arrived at the scene, Sharp saw the respondent pulling a man out of the car. The respondent then kicked and beat the man for five to ten seconds. Sharp testified that the respondent searched the man's pockets before he ran off toward Garden Street. T. at 930-35, 949-51, 957-61. Sharp testified that blood was "gushing" from the man's neck after the respondent left him lying in the street. T. at 978.[4]

Terry Davis, the drug dealer who had initially approached Fournier and Jones, testified that he saw the respondent engaging in a transaction with the two men, and then saw them drive off with the respondent holding onto the window frame and running beside the car. T. at 310-14. He also saw the car run a stop sign and collide with a truck. Davis testified that the respondent "barely got off the car" before the "moment of contact" with the truck. Davis then saw the respondent get up and run across Albany Avenue. T. at 316, 322. After witnessing the collision, Davis went the other direction on Irving Street toward Homestead Avenue. After a few minutes, Davis went back down

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[4] Sharp refused to testify at the petitioner's trial; T. at 912; but his testimony at the hearing in probable cause was read into the record. T. at 925-89.

Irving Street to the intersection of Albany Avenue. T. at 316-17, 322-23. When he arrived at the scene, Davis saw the passenger from the car lying face down in front of the car bleeding from his head. T. at 316-19.

Dr. Arkady Katsnelson, the medical examiner who performed the autopsy on the victim, testified that Jones suffered extensive and multiple contusions and lacerations to the head and face and contusions and abrasions to the chest and upper abdomen. The victim also suffered extensive fractures in the maxilla, or upper jaw, and suffered three broken ribs. T. at 522-28, 539. The victim suffered "multiple and extensive fractures of the skull" as a result of six separate blows to the head. T. at 534-36. When Katsnelson opened the victim's head, he did not need to use a saw because the skull was so extensively fractured. Fragments of broken bone had lacerated the membrane which covers the brain, as well as the brain itself. There was a transection of the victim's brain, which means a complete laceration and separation of one part of the brain from another due to an extremely forceful blow. T. at 535-38. Katsnelson testified that he observed no other injuries to the victim and that the cause of death was blunt trauma to the head. T. at 540-41. Finally, Katsnelson testified that the victim's injuries were inconsistent with injuries caused in a motor vehicle accident. T. at 547-48.[5]

Steven Grabowski, a detective from the Hartford Police Department, testified that when he interviewed

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[5] At the hearing in probable cause, Dr. Katsnelson specifically testified that there were no gunshots wounds or stab wounds on the victim's body. T. at 174-75.

Fournier at the hospital, he was uncooperative, intoxicated and unable to express himself clearly. T. at 703-705. Grabowski also testified that in November, 1997, the respondent gave him a written statement regarding his participation in the incident. T. at 742, 758. Finally, Grabowski testified that while he was at the scene of the accident, he observed blood spatter on the front license plate of Fournier's car. T. at 700.

Dr. Heather Coyle, a criminalist from the state crime lab, testified that the DNA profile of the blood on the license plate was an exact match for the DNA profile from a sample of the victim's blood. T. at 899-905.

The respondent testified on his own behalf at trial. In his testimony, the respondent denied selling drugs and claimed that he approached Fournier's car because "[he] was just being nosy." He testified that when Fournier sped off, he just "didn't let go of the car" and rode it to the intersection. T. at 1038. The respondent testified that after the crash, he went to the car and saw Jones on the ground and Fournier walking away from the wreck. He claimed that he stayed on the scene only briefly before departing. T. at 1040-43, 1065.

The respondent's testimony was consistent with the statement that he had given to Detective Grabowski and an oral statement that he gave to Detective Keith Knight in April, 1996. T. at 761-62, 383-86, 1036-43.[6]

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[6] The respondent concluded the sworn statement that he gave to Detective Grabowski by stating that "I can honestly say that no one touched [the victims]. T. at 762; State's Exhibit 49A.

On October 27, 2000, the jury returned a verdict of not guilty on the charge of murder but guilty of the lesser included offense of manslaughter in the first degree, in violation of Connecticut General Statutes § 53a-55(a)(1). T. at 1307-1308. Thereafter, the trial court sentenced the respondent to imprisonment for nineteen years. T. at 1336. The respondent appealed and the Appellate Court affirmed his conviction. *State v. Bryant*, 71 Conn. App. 488, cert. denied, 261 Conn. 939 (2002).

B. The Hearing on the Respondent's Habeas Corpus Petition

In his state petition for a writ of habeas corpus, the respondent claimed that his conviction was obtained in violation of his Sixth Amendment right to the effective assistance of counsel. "Amended Petition" at 5, *Bryant v. Warden*, Case No. CV03-0003933-S, Judicial District of Tolland.[7] In his petition, the respondent alleged that his trial counsel, Assistant Public Defender David Smith, was ineffective for numerous reasons. At the hearing on his petition, however, the respondent's counsel focused on a claim that Smith was ineffective in failing to present a defense that the victim was fatally shot by an unknown gunman rather than being kicked and beaten to death by the respondent.

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[7] The respondent also claimed that his conviction violated his right to the effective assistance of counsel under Article First, § 8, of the Connecticut Constitution. "Amended Petition" at 5, *Bryant v. Warden*, supra. The Connecticut Supreme Court has held, however, that "the state and federal constitutional standards for review of ineffective assistance of counsel claims are identical." *State v. Drakeford*, 261 Conn. 420, 431 (2002), quoting *Aillon v. Meachum*, 211 Conn. 352, 355-56 n.3 (1989).

The respondent called Thomas Davis, the driver of the vehicle that struck the victims' car, as a witness at the habeas hearing. Davis testified that on April 14, 1996, he was working as an armed security guard for Metro Loss Prevention Services. Davis testified that during the early morning hours of that day, he was driving an SUV owned by his employer on Albany Avenue in Hartford. As he approached the intersection of Irving Street, Davis testified that he heard several gunshots that he thought had come from the gas station at the corner. T. 1/19/05 at 16.[8] Davis then saw a small, blue car coming out of Irving Street. When the car drove through the intersection, Davis' vehicle collided with it and caused it to spin around and strike a telephone pole. Davis' vehicle came to rest with its rear window facing the blue car. T. 1/19/05 at 17-18.

Davis testified that three or four seconds after the collision, a white "late seventies model Lincoln or Cadillac" came out of Irving Street. The white car was occupied by a driver and a passenger. The car stopped and the passenger got out and approached Davis. Davis described the passenger as a "light-skinned Spanish male." T. 1/19/05 at 18-19. Davis testified that the passenger had an "item" in his hand that he "couldn't identify." Davis stated, however, that "[a]t that time of night, and in that area" he assumed that the item was a gun. T. 1/19/05 at 19-20, 46. Davis took out his sidearm and displayed it to the man. Upon seeing the weapon, the man looked startled, "turned and went up

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[8] Citations to the transcript of the hearing on the respondent's habeas petition are signified by 'T. followed by the date on which the testimony to which reference is made was given.

to the corner where the car accident was." Davis testified that the white car then left the scene. T. 1/19/05 at 19-21.

Davis testified that after the vehicles came to rest, there "was lots of chaos" at the scene and that there were "several people out there jumping up and down." Davis stated, however, that he "wasn't too sure what was going on." T. 1/19/05 at 22. Davis testified that he saw one man exit the car and stumble toward the "front stoop" of a package store where he sat down. He stated that neither occupant was dragged from the car and that he did not see anyone kick or beat the men. T. 1/19/05 at 21, 23-24. Davis testified that he assumed that the gunshots that he heard, the large white car and the blue car with which he had collided were all connected. T. 1/19/05 at 21, 47. He acknowledged, however, that "[g]unshots in the north end of Hartford every night are ... a common thing." T. 1/19/05 at 21.

The respondent also called Melissa Young-Duncan as a witness. Young-Duncan testified that on April 14, 1996, she was employed as an Emergency Medical Technician (EMT) by L & M Ambulance Service. She testified that at 1:30 a.m., she was dispatched to the scene of a motor vehicle accident at the intersection of Irving Street and Albany Avenue. Upon her arrival, Young-Duncan observed a car that had come to rest next to a telephone pole and a man lying next to it. Young-Duncan testified that when she examined the man, she observed "[w]hat appeared to be a gunshot ... [t]o his left temple." T. 1/7/05 at 5-9. She testified that the wound she observed was "perfectly round and was the same size as a bullet." She testified

that based on her training, she concluded that the wound she observed was a gunshot wound. T. 1/7/05 at 9-11.

Young-Duncan testified that at the time of the incident, she had trained to the level of "EMT Intermediate." She testified, however, that she had received no training on gunshot wound identification prior to the incident. T. 1/7/05 at 10. On cross-examination, Young-Duncan testified that she spent a total of about twenty minutes with the victim on the night of the incident. T. 1/7/05 at 19-20.

The respondent also called John Gartley as a witness during the presentation of his case. Gartley testified that on April 14, 1996, he was employed as a paramedic by L & M Ambulance Service. He testified that his partner that night was Melissa Young-Duncan. Gartley testified that at 1:33 a.m. on that date, they were dispatched to the intersection of Irving Street and Albany Avenue. T. 1/7/05 at 23-25. When Gartley arrived at the scene, he observed a car that had come to rest near a telephone pole and a man lying on the ground nearby. T. 1/7/05 at 25-27.

When Gartley began to attend to the man, he observed what he believed to be a gunshot wound in the man's left temple. T1. at 28. Gartley testified that he believed the wound that he observed was a gunshot wound for the following reasons:

> First, it was a small circular-type hole, maybe the roundness of a of a pencil.... There was some tissue protruding back out of the hole, which is normal for a gunshot wound of that type, and there was some black residue around the hole, possibly, you know, like a powder burn ... from a close-range shot.

T. 1/7/05 at 28. Gartley testified that he received training in gunshot wound identification during his one year of paramedic training at Capital Community Technical College. T. 1/7/05 at 29.

On cross-examination, Gartley testified that the victim had suffered numerous other injuries. He testified that "[t]here were multiple contusions ... bruises, some swelling and what appeared to be a boot print on him." T. 1/7/05 at 30. On redirect examination, the respondent's counsel asked Gartley if he were certain that he had observed a boot print on the victim. Gartley replied "Well, I can't be exactly sure. It looked more like a boot than a shoe print." T. 1/7/05 at 34.

The petitioner also called Rene Fleury at the hearing. Fleury testified that in April 1996, she was engaged to Gary Fournier and shared an apartment with him. T. 1/19/05 at 4-5. On Saturday, April 13, 1996, Fleury allowed Fournier to drive her 1995 Ford Escort to work. Fournier did not come home that night and when Fleury arose the next day, Fournier had still not returned to their apartment. Fleury testified that she went to work at 7:00 or 8:00 a.m. that day. T. 1/19/05 at 6-7.

Sometime after Fleury arrived at work, Fournier came to the restaurant where she was employed. Fournier told her that he had been involved in an automobile accident. Fleury decided to leave work and return with Fournier to their apartment. T. 1/19/05 at 7-8. Fleury testified that Fournier was badly bruised and cut up. He was not very mobile and it took Fleury and a friend to "get him up to the apartment and into bed." As they were getting Fournier into bed, Fleury again asked him about the incident. Fournier said something about three Spanish guys with a gun. T. 1/19/05 at 8-9. She testified that she asked Fournier for more information, as follows:

> I asked him, again, what had happened that night, he told me that he got in a car accident, and that Eddy, the other gentleman in the car, got beat up, and he got beat up, and that was pretty much all I ever got out of him.

T. 1/19/05 at 9.

Fleury later gave a statement to the police regarding Fournier's behavior on that morning. In her statement, Fleury indicated that as she was putting Fournier to bed, he said "something about three Spanish guys with a gun, but nothing he said made any sense." Petitioner's Exhibit 2, *Bryant v. Warden*, CV03-0003933-S, Judicial District of Tolland.

Based on the testimony of these four witnesses, the habeas court granted the petition and ordered a new trial. "Memorandum of Decision," *Bryant v. Warden*,

supra, at 17. In its decision, the habeas court ruled that the petitioner's trial defense counsel provided "inadequate representation" because he had failed to introduce "available and credible evidence of a clearly exculpatory nature" at the petitioner's trial. Id., at 13.

In reaching this decision, the court contrasted the testimony of the four witnesses called by the petitioner at the habeas hearing (Thomas Davis, Young-Duncan, Gartley and Fleury) with that of Ewan Sharp, whose testimony from the probable cause hearing was read into evidence at the petitioner's trial. "Memorandum of Decision," *Bryant v. Warden*, supra, at 13-14. The court found the credibility of the four witnesses to be "considerable and compelling." Id., at 13. The court found, therefore, that the testimony offered by the four witnesses "could easily have led a jury to harbor a reasonable doubt as to the guilt of the petitioner." Id., at 14. Accordingly, the court concluded that "it was deficient performance on the part of trial defense counsel not to present this testimony at the petitioner's original trial." Id. The court also concluded that the petitioner was prejudiced by the failure to call these witnesses "[g]iven the significance of [their] potential exculpatory testimony and its propensity to induce reasonable doubt in the minds of the jury." Id., at 14-15.

Nonetheless, the habeas court conceded that "there are some contradictions in the record." Memorandum of Decision," *Bryant v. Warden*, supra, at 16. The habeas court noted that the medical examiner's report "found no evidence of a gunshot wound to the head." In order to explain this anomaly in its theory, the habeas court speculated that "*it is not impossible*

that the force of the impact of the collision, coupled with a gunshot wound to the head and emergency medical treatment at the trauma center that a severe fracturing of the skull *might* have masked the existence of the gunshot wound by the time of the post-mortem examination." (Emphasis added.) Id. The habeas court also noted that the petitioner's testimony at trial refuted the existence of a white Cadillac and a shooting before the collision. The court dismisses this significant flaw in its logic simply by stating that the petitioner did not claim "actual innocence." Id. The court concluded, therefore, that "[t]he jury were entitled to hear this testimony before they made the finding of guilty." Id.

C. Appellate Review of the Habeas Court's Decision

The Commissioner of Correction appealed from the judgment of the habeas court and the Connecticut Appellate Court reversed. *Bryant v. Commissioner of Correction*, 99 Conn. App. at 444. After granting the respondent's petition for certification to appeal, however, the Connecticut Supreme Court reversed the decision of the Appellate Court and restored the habeas court's order granting a new trial. *Bryant v. Commissioner of Correction*, 290 Conn. at 527.

1. Decision of the Connecticut Appellate Court

In reversing the habeas court's ruling, the Appellate Court held that the respondent had failed to show that the performance of his trial counsel was deficient under *Strickland v. Washington*, 466 U.S. 668,

687-91, reh. denied, 467 U.S. 1267 (1984). *Bryant v. Commissioner of Correction*, 99 Conn. App. at 443-44. The court noted that the respondent "did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the April 14, 1996 incident." Id., at 443. The court concluded, therefore, that "the presentation of a defense regarding an unknown gunman would have been rendered implausible by the petitioner himself." Id. The court further observed that:

> [I]n developing the [respondent's] defense, [Assistant Public Defender] Smith weighed the testimony of Young-Duncan and Gartley and determined that they were entirely unsupported by any other evidence. No other witness indicated the presence of a gun at the scene, including the [respondent]. Additionally, the medical examiner's report and the records from Saint Francis Hospital and Medical Center belied such contention because there was no [stippling] or gunshot residue on the head of the victim, there was no indication of an entrance wound or exit wound and there were no lead fragments found inside the victim's head.

Bryant, 99 Conn. App. at 443.

Accordingly, the court concluded that "Smith's decision not to call the four witnesses was a matter of trial strategy." *Bryant v. Commissioner of Correction*, 99 Conn. App. at 444. The court further stated that:

> Contrary to our settled law, the [habeas] court *did not accord any deference* to Smith's tactical decision or make *any attempt to evaluate his conduct from his perspective* at the time of the [respondent's] criminal trial. Rather, the court employed hindsight to retry the case as if the omitted testimony had been offered and admitted, and the court *engaged in speculation* that the testimony would have been credited even though it was inconsistent with the [respondent's] version of events and all the forensic evidence.

(Emphasis added.) *Bryant*, 99 Conn. App. at 444. Consequently, the Appellate Court concluded that the habeas court "improperly determined that the performance of counsel was deficient." Id.

2. Decision of the Connecticut Supreme Court

On appeal to the Connecticut Supreme Court, the respondent claimed that the Appellate Court had erred in ruling that his trial counsel's failure to present a defense that the victim ~~was~~ shot in the head by an unknown gunman did not constitute ineffective assistance of counsel. *Bryant v. Commissioner of Correction*, 290 Conn. at 503. The court began its analysis of the respondent's claim by noting that in order to prevail, the respondent had to show that the performance of his counsel was deficient and that he was prejudiced by that deficient performance. Id. at 510.

The court further noted that "[j]udicial scrutiny of counsel's performance must be highly deferential...." *Bryant v. Commissioner of Correction*, 290 Conn. at 512, quoting *Strickland v. Washington*, 466 U.S. at 689. The court observed, therefore, that "[a] fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Bryant*, 290 Conn. at 512, quoting *Strickland*, supra, 689.

In conducting its analysis, the Connecticut Supreme Court first determined whether evidence of the unknown gunman would have been admissible under Connecticut law as third party culpability evidence. *Bryant v. Commissioner of Correction*, 290 Conn. at 514-15. The court concluded that because the evidence in question established a direct connection between a third party and the charged offense, it was relevant to the issue of the respondent's guilt or evidence. Id., at 515.

Nevertheless, the court observed that "[i]t is not ineffective assistance of counsel ... to decline to pursue a third party defense when there is insufficient evidence to support that defense. *Bryant v. Commissioner of Correction*, 290 Conn. at 515, citing *Dunkley v. Commissioner of Correction*, 73 Conn. App. 819, 827 (2002), cert. denied, 262 Conn. 953 (2003). In this case, however, the court found that "the testimony of Davis, Young-Duncan, Gartley and Fleury would have worked in to create a credible scenario in which the cause of [the victim's] death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic

males driving a white Cadillac or Lincoln, not the actions of the [respondent]." *Bryant,*, 290 Conn. at 516.

Accordingly, the court stated that under Connecticut's "third party culpability rules, the testimony tending to show that the unidentified Hispanic males with a gun were responsible for [the victim's] death would have been relevant to the jury's determination of whether there existed a reasonable doubt as to the [respondent's] guilt." *Bryant v. Commissioner of Correction*, 290 Conn. at 517. The court concluded, therefore, that "the failure to present this relevant, plausible third party culpability defense constituted deficient performance on the part of defense counsel under *Strickland*." Id., at 517-18.

The Connecticut Appellate Court concluded that the decision of the respondent's trial counsel, Attorney Smith, not to rely on the "unknown-gunman" defense was reasonable because of two significant weaknesses in the theory. First, the Appellate Court noted that respondent himself did not mention that a gunman was involved in the incident in either of his statements to the police or in his testimony at trial. *Bryant v. Commissioner of Correction*, 99 Conn. App. at 434. Second, the court noted that neither the autopsy of the victim nor the medical records of his treatment revealed the existence of a gunshot wound. Id.

The Connecticut Supreme Court dismissed these concerns. First, the court stated that it was "possible that the [respondent] simply did not hear the gunshots or see the white vehicle and the unidentified Hispanic males" when they drove up to the scene of the accident

and shot the victim in the head. *Bryant v. Commissioner of Correction*, 290 Conn. at 520 n.14. Second, the court stated that the testimony of Dr. Katsnelson, the medical examiner who conducted the autopsy, "was not irrefutable." Id., at 525. The court suggested that Dr. Katsnelson's credibility could have been successfully challenged on cross-examination by confronting him with the opinions of the Young-Duncan and Gartley, the emergency medical personnel who treated the victim on the night of the incident. Id., at 526 n.22. Accordingly, the court was not "persuaded by the state's argument that deference to trial strategy saves Smith's actions." Id., at 521.[9]

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[9] The two concurring justices agreed that Attorney Smith provided ineffective assistance, but they did not agree that he ineffective for failing to present a defense that was predicated on the theory that the victim was shot to death by a small group of unidentified Hispanic males. *Bryant v. Commissioner of Correction*, 290 Conn. at 527-28 (*Palmer, J.*, concurring). The concurrence concluded that Smith was ineffective in failing to present the testimony of Thomas Davis, the driver of the SUV, to refute the state's theory that the respondent beat the victim to death. Id., at 528. The concurrence stated that Davis would have testified that he was at the scene in the aftermath of the collision and that he did not see the victim being beaten. Id., at 536. The concurrence concluded, therefore, that "Davis's testimony is unassailable and casts grave doubt on the only evidence that the state adduced implicating the petitioner in Jones's [killing]." Id.

REASONS FOR GRANTING THE WRIT

In *Strickland v. Washington*, this Court struck a delicate balance between the right of defendants to a fair trial and the interest of the states in the finality of their criminal judgments. *Strickland* did this by permitting defendants to obtain relief on claims of ineffective assistance of counsel but by also imposing stringent standards for obtaining such relief. The Court held that a claim of ineffective assistance of counsel has two components. The Court stated that:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so egregious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires that showing that counsel's unprofessional errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

The *Strickland* court was well aware that when assessing the performance of defense counsel, it would be "all too tempting to second-guess counsel's assistance after conviction...." *Strickland v. Washington.*, 466 U.S. at 689. The court concluded, therefore, that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. The court stated that "[a] fair

assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time." Id.

Indeed, Justice O'Connor, writing for the court in *Strickland*, warned that:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Strickland v. Washington, 466 U.S. at 690. The Connecticut Supreme Court's decision in this case, as well as decisions by the courts of other states, make it all too clear that precisely what Justice O'Connor feared has come to pass.

In the twenty-five years since *Strickland* was decided, there has been an erosion of the stringent standards established in that case to a point where absurd decisions, such as the one by the Connecticut Supreme Court in *Bryant v. Commissioner of Correction*, are possible. Indeed, the courts of other states have decided cases with equally egregious results. See, e.g., *Anfinson v. State*, 758 N.W. 2d 496 (Iowa 2008) (in case involving drowning of infant, counsel ineffective for failing to raise a post-partum depression defense even though such defense would have been inconsistent with defense claim of accident); *Commonwealth v. Hill*, 432 Mass. 704, 717-20 (2000) (counsel ineffective for failing to call witness whom he deemed to be hostile, lacking in credibility because of drug use and whose description of the perpetrator fit the defendant to some degree); *In re Maxfield*, 133 Wash.2d 332, 344 (1997) (counsel ineffective for failing to raise previously unrecognized state constitutional right to privacy in public utility records).

The decision of the Connecticut Supreme Court in *Bryant v. Commissioner of Correction* is not an aberration, but is, rather, an extreme example of a common problem throughout the country. Accordingly, this Court should grant certiorari in this case to better define the scope of "reasonableness under prevailing professional norms," *Strickland*, supra, 688, to provide guidance to lower courts regarding the application of "highly deferential" review, id., at 689, and to correct the egregious misapplication of *Strickland* in this case.

A. The Connecticut Supreme Court Failed to Afford Appropriate Deference to Decisions Made by Respondent's Counsel

In *Strickland v. Washington*, this Court held that in order to prevail on a claim of ineffective assistance of counsel, the petitioner must show that show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment..." Id., 466 U.S. at 687. Moreover, the Court stated that "[j]udicial scrutiny of counsel's performance must be highly deferential." Id., at 689.

While the Connecticut Supreme Court acknowledged this standard, it failed to heed the this Court's strong admonition against second-guessing the decisions of trial counsel. Instead, the court substituted its own judgment for that of the trial counsel, and concluded that there was a better defense available to the petitioner. In doing so, the court overlooked the fact that "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d 732, 736 (9th Cir.), cert. denied, 525 U.S. 839 (1998); see *Bloom v. Vasquez*, 840 F. Supp. 1362, 1369 (C.D. Cal. 1993) (ability to fashion different, or even better, defense is irrelevant if defense presented was a reasonable tactical decision).

In this case, the trial counsel's decision not to base the petitioner's defense on the theory that the victim was shot to death by an unknown gunman was

entirely reasonable. As the Connecticut Appellate Court noted, the respondent "did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the ... incident." *Bryant v. Commissioner of Correction*, 99 Conn. App. at 443. A defense based on the existence of such a gunman, therefore, would have been completely implausible. Moreover, none of the witnesses, including the respondent, were able to say that they saw a gun at the scene. Finally, the autopsy report included no indication that the victim had been shot. As the Appellate Court noted, "the medical examiner, who had more than twenty years of experience and performed thousands of autopsies, testified that the victim had sustained several injuries to various parts of his body as the result of blunt trauma and that the cause of the victim's death was blunt trauma to the head." Id. The defense proposed by the respondent in his habeas corpus petition offered no explanation for these injuries.

In addition, the state supreme court failed to consider that the petitioner was originally charged with murder. When faced with such a serious charge, a prudent defense counsel would certainly be reluctant to base his client's defense on a tenuous theory with such obvious disadvantages. Indeed, in *United States v. Cronic*, 466 U.S. 648 (1984), this Court observed that "[i]f there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." Id., at 657 n.19.

Finally, the Connecticut Supreme Court compounded its error by resorting to speculation and conjecture to support its conclusion that counsel's decision not to rely on a defense that the victim was shot by an unknown gunman constituted deficient performance. The most daunting obstacle to a defense that the victim was shot to death is the absence of any indication in the autopsy report that he suffered a gunshot wound. The court suggests, with absolutely no basis for doing so, that the medical examiner's "testimony was not irrefutable." *Bryant v. Commissioner of Correction*, 290 Conn. at 525. Indeed, the court even suggests that the medical examiner's testimony could have been impeached by confronting him with the observations of the paramedic and the EMT who treated the victim at the scene. Id., at 526 n.22. It is, of course, highly unlikely that an experienced medical examiner would admit an egregious professional error when confronted with the fact that the emergency personnel who treated the victim disagreed with his conclusion. The court also dismissed the troubling fact that the petitioner never mentioned a gunman in any of his statements to the police with the implausible suggestion that the petitioner simply failed to notice when the victim was shot to death in his presence. Id., at 521 n.14. It is difficult to imagine, however, that the petitioner could have failed to notice three men pursuing the victim in a white Cadillac and then shooting him in the head at close range.

If the standards established in *Strickland* and this Court's guidance with regard to claims of ineffective assistance are to have any meaning, they must be upheld and enforced by the Court. Accordingly, this

Court should grant certiorari to correct the egregious misapplication of *Strickland* by the Connecticut Supreme Court in this case.

B. Failure to Afford Appropriate Deference to Trial Counsel in Other States

While the Connecticut Supreme Court's ruling in *Bryant v. Commissioner of Correction*, supra, represents an extreme example inappropriate second guessing of defense counsel by a court reviewing an ineffective assistance of counsel claim, Connecticut is by no means the only state where the highest court has failed to apply appropriate deference when evaluating the performance of counsel under *Strickland*.

For example, in *Anfinson v. State*, 758 N.W.2d 496 (Iowa 2008), the Iowa Supreme Court held that the performance of the trial defense counsel was deficient because he had failed to raise a postpartum depression defense in a prosecution for the drowning death of an infant. Id., at 505. The petitioner in *Afinson* was charged with murder as a result of the drowning death of her infant son. After reporting the child missing, the petitioner told the police that the child had drown accidentally and that she had panicked and had disposed of the body in a nearby lake. Id., at 498. At trial, the petitioner's defense counsel relied exclusively on a defense of accident. The petitioner was, nevertheless, convicted of second degree murder. Thereafter, she filed an application for post conviction relief alleging that her trial counsel was ineffective for failing to raise a defense based on postpartum

depression. Id., at 499. In the post conviction proceeding, her trial defense counsel testified that he did not want to introduce postpartum depression into the case because he was concerned that it could lead the jury to believe the petitioner had intentionally killed the child. Id. at 500 n.3. The Iowa Supreme Court, however, concluded that evidence of postpartum depression could have supported the petitioner's defense of accident, Accordingly, the court found that the defense counsel was ineffective and ordered a new trial. Id., at 505.

In *Commonwealth v. Hill*, 423 Mass. 704 (2000), the Supreme Judicial Court of Massachusetts held that the defendant was denied his right to the effective assistance of counsel because the his trial counsel had failed to call a witness who could have provided third party culpability evidence. Id. at 680. The defendant and Robert Shular were charged with the murder of an elderly man in an apartment belonging to Israel Lewis, a known drug dealer. Id., at 705-706. The Commonwealth's theory was that the defendant and Schular broke into Lewis's apartment to steal money. While they were in the apartment, they were confronted by Lewis's grandfather. A struggle ensued and the defendant shot and killed the elderly Lewis. Id., at 705.

Shular and the defendant were tried separately and Shular was tried first. Shular's attorney called Jose Ramos as a witness at the trial. Ramos, who had lived across the street from Lewis's apartment, testified that on the day of the murder, he saw a car pull up in front of the house, and a man get out. Ramos testified that the man went into the Lewis's house. A few minutes later, Ramos heard a shot. He then looked out his

window and he saw the same man running back to the car and getting in. *Commonwealth v. Hill*, supra, 717. After hearing Ramos' testimony, the jury acquitted Shular. Shular's attorney told the defendant's attorney about Ramos, but the defendant's attorney did not call Ramos as a witness at the defendant's trial. The defendant was convicted of the murder. The defendant moved for a new trial claiming that his trial counsel had been ineffective in failing to call Ramos as a witness. The defendant's attorney testified that he did not call Ramos as a witness because Ramos was extremely hostile, he was a drug user and the description of the man Ramos saw leaving the house where the victim was murdered resembled the defendant. Id. Nevertheless, the Supreme Judicial Court found that the defendant's trial counsel ineffective in failing to call Ramos as a witness at the defendant's trial. Id., at 717-18.

In the *Matter of Maxfield*, 133 Wash.2d 332 (1997), the Washington Supreme Court found that the petitioner's trial defense counsel was ineffective in failing to raise a defense based on a state constitutional right that had not been recognized at the time of the petitioner's trial. The petitioner had been convicted of cultivating marijuana in his home. The petitioner's marijuana growing operation came to the attention of the police when an official of the power company advised them of the petitioner's high level of power consumption. Id., at 335. At trial, the petitioner's defense counsel made no claim that the power company official's action violated the petitioner's constitutional rights. In the petitioner's action for post conviction relief, the Washington Supreme Court recognized for the first time a state constitutional right to privacy in public utility

records and found the petitioner's trial lawyer ineffective for not raising a claim based on that right at the petitioner's trial. Id. at 339-45.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted to correct the error of the Connecticut Supreme Court and to clarify this area of the law.

Respectfully submitted,

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July 20, 2009

No. _____

In The

Supreme Court Of The United States

BRIAN K. MURPHY,
Petitioner,

v.

BERNALE BRYANT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

APPENDIX TO CONNECTICUT COMMISSIONER OF CORRECTION'S PETITION FOR WRIT OF CERTIORARI

APPENDIX

TABLE OF CONTENTS

PAGE

Bernale Bryant v. Commissioner of Correction, 290 Conn. 502 (2009) A-1

Court Order Denying Commissioner's Motion for Reconsideration and Reargument En Banc A-31

BERNALE BRYANT v. COMMISSIONER OF CORRECTION
(SC 17896)

Rogers, C. J., and Norcott, Palmer, Vertefeuille and Schaller, Js.

Argued April 24, 2008—officially released March 10, 2009

Peter Tsimbidaros, for the appellant (petitioner).

Michael E. O'Hare, supervisory assistant state's attorney, with whom, on the brief, were Gail Hardy, state's attorney, and David Zagaja, assistant state's attorney, for the appellee (respondent).

Opinion

SCHALLER, J. The sole issue in this certified appeal is whether trial counsel for the petitioner, Bernale Bryant, rendered ineffective assistance by failing to present four independent witnesses whose testimony, the petitioner claims, would have supported a third party culpability defense and substantially impeached the evidence presented against the petitioner. The petitioner appeals from the judgment of the Appellate Court reversing the judgment of the habeas court, which had granted his petition for a writ of habeas corpus. On appeal, the petitioner claims that the Appellate Court improperly concluded that the performance of his trial counsel was not deficient. The petitioner contends that the defense counsel's failure to

present the witnesses constituted ineffective assistance of counsel, and that the habeas court properly rejected the argument of the respondent, the commissioner of correction, that it was a matter of trial strategy. We agree with the petitioner and reverse the judgment of the Appellate Court.

The Appellate Court's decision on direct appeal in *State v. Bryant*, 71 Conn. App. 488, 802 A.2d 224 (2002), sets forth the facts, as found by the jury, that led to the petitioner's conviction. "The jury reasonably could have found that on April 14, 1996, the [petitioner] repeatedly and seriously injured [the victim] Edward Jones, and those injuries caused Jones' death. . . .

"After drinking beer and using narcotics together, in the early morning hours . . . Gary Fournier and [Jones], drove to Irving Street and Albany Avenue in Hartford to get more narcotics. The pair planned to obtain the narcotics and drive off without paying for them. Fournier stopped his car and was approached by Terry 'T-Time' Davis, a known drug seller. Shortly thereafter, the [petitioner] approached the car and handed Fournier some cocaine.

"As soon as Fournier had the cocaine in hand, he drove off without paying for the contraband. The [petitioner] continued to hang onto the car as Fournier drove off. The [petitioner] released his hold of the car just as it ran through a stop sign and was struck by another automobile. The [petitioner] then went to Fournier's car, dragged Fournier from the car, pushed him to the ground and kicked him several times before running to the passenger's side of the car. The

[petitioner] dragged Jones through the passenger window, and hit and kicked him repeatedly while he lay on the street. The [petitioner] then ran from the scene." Id., 490. Jones subsequently was taken to the hospital, where he was pronounced dead.[1] Id., 491.

The petitioner was charged with murder in violation of General Statutes § 53a-54a. After a jury trial, the petitioner was acquitted of the murder charge, but was found guilty of the lesser included offense of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1). The petitioner appealed from the judgment of conviction to the Appellate Court, which affirmed his conviction.[2] See id., 488. Upon the

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[1] After an autopsy, the state's medical examiner, Arkady Katsnelson, concluded that the cause of Jones' death was blunt head trauma, and that the manner of death was homicide

[2] On direct appeal, the petitioner claimed that: (1) the introduction at trial of a transcript of the testimony from the probable cause hearing of an eyewitness, Ewan Sharp, violated the petitioner's constitutional right of confrontation because he was unable to cross-examine Sharp as to the benefits that Sharp had received for his testimony; and (2) the trial court violated the petitioner's constitutional right to present a defense when it prohibited him from presenting extrinsic evidence at trial as to the benefits received by Sharp for his testimony at the probable cause hearing. See *State v. Bryant*, supra, 71 Conn. App. 489-90. Sharp's testimony potentially played a significant role at trial because, upon his arrest for robbery in 1999, he told the Hartford police department that he had witnessed the accident four years prior and had witnessed the petitioner repeatedly beating Jones. Id., 491. Thereafter, the petitioner was arrested for Jones' murder. Id. The Appellate Court rejected both of the petitioner's claims on direct appeal, concluding that the petitioner had a sufficient opportunity to cross-examine Sharp at the probable cause hearing and that the exclusion of the evidence of the benefits given to Sharp for his

Appellate Court's affirmance of his conviction, this court denied the petitioner's petition for certification to appeal. *State v. Bryant*, 261 Conn. 939, 808 A.2d 1133 (2002).

Subsequently, the petitioner filed a petition for a writ of habeas corpus alleging that his confinement was illegal because he had been denied the effective assistance of counsel. The petitioner based his claim principally on his trial counsel's failure to present four independent witnesses at trial whose testimony would have supported an alternative theory of the cause of Jones' death. That theory did not implicate the petitioner, but instead implicated a small group of unidentified Hispanic men with a gun traveling in a white automobile. Trial counsel did not present this third party culpability defense to the jury. More specifically, the petitioner alleged that counsel should have called the following witnesses to testify to support that theory: Thomas Davis, the driver of the automobile that was struck by Fournier's vehicle; Melissa Young-Duncan, an emergency medical technician who responded to the scene and assisted Jones; John Gartley, a second emergency medical technician who responded to the scene and assisted Jones; and Rene Fleury, Fournier's girlfriend, who spoke with Fournier shortly after the incident. The habeas court found that the petitioner had been denied effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because "the missing testimony could easily have led a jury to harbor a reasonable doubt as to the guilt of the

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testimony constituted harmless error. Id., 492–97.

petitioner." (Emphasis in original.) Accordingly, the habeas court set aside the petitioner's conviction, and ordered a new trial.

The respondent filed a petition for certification to appeal, which the habeas court denied. Thereafter, the respondent appealed to the Appellate Court, claiming, inter alia, that the habeas court: (1) abused its discretion by denying the petition for certification to appeal; and (2) improperly concluded that the petitioner's trial counsel was ineffective by failing to present a theory of defense that was not supported by forensic evidence or the petitioner's testimony. The Appellate Court agreed and reversed the judgment of the habeas court. *Bryant v. Commissioner of Correction*, 99 Conn. App. 434, 441–44, 914 A.2d 585 (2007). We granted the petitioner's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly reverse the habeas court's decision to grant the petitioner's writ of habeas corpus?" *Bryant v. Commissioner of Correction*, 282 Conn. 910, 922 A.2d 1098 (2007).

The following additional relevant facts found by the habeas court are necessary for our resolution of the petitioner's claim that he was rendered ineffective assistance of counsel. The habeas court heard testimony from the four witnesses whom the petitioner claims should have testified at trial: Davis, Young-Duncan, Gartley and Fleury. After hearing their testimony, the habeas court found that "[h]ad [these witnesses] testified at the petitioner's trial, it is reasonably probable that the jury could have found the following scenario to be true": Davis, a Marine Corps veteran and

gunnery specialist, employed in the Hartford area as a security guard, was driving in a company vehicle the evening of April 14, 1996. As he approached the intersection of Albany Avenue and Irving Street, Davis heard gunshots and identified them as originating from a small caliber weapon, probably a .22 caliber pistol. Immediately thereafter, Davis observed a blue Ford Escort (Ford),[3] traveling in the wrong direction, exit from Irving Street, a one-way street, onto Albany Avenue. The driver of the Ford appeared to be slumped over the wheel. A white Cadillac or Lincoln, also traveling in the wrong direction on Irving Street, pursued the Ford. Davis' vehicle collided with the Ford. Immediately after the accident, he observed the white vehicle stop and a light skinned Hispanic man exit the rear passenger seat of the vehicle.[4] The man approached Davis' vehicle carrying an object in his hand, which Davis could not see. Having heard the gunshots and believing the neighborhood to be dangerous, Davis displayed his own firearm, upon which the man went back to the white vehicle and it departed. At no time did Davis observe anyone remove the occupants from the Ford; nor did he observe anyone beat or kick them. Prior to trial, the investigator who worked for the petitioner's trial counsel had contacted and interviewed Davis, who related these events to the investigator. Davis also reported the gunshot he heard to the Hartford police department, but the police did not include his statement in their incident report. The

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[3] It is undisputed that Fournier and Jones were the occupants of the Ford.

[4] As the habeas court noted, the petitioner is African-American.

habeas court further found that Davis was available to be subpoenaed by either party at the original trial.

The court also found that a jury could have determined that Young-Duncan and Gartley are both experienced emergency medical technicians who were serving as an ambulance crew on the night of the incident. After receiving a call to assist at an automobile accident on the corner of Albany Avenue and Irving Street, they promptly arrived at the scene and provided the initial medical treatment to Jones. Both Young-Duncan and Gartley noticed what appeared to them, based on their training and experience, to be a gunshot wound to Jones' left temple. Specifically, they identified the wound as a gunshot wound based on its small size and round shape as well as what appeared to be a powder burn. Furthermore, on the other side of Jones' head, there appeared to be a powder burn that was consistent with an exit wound. Young-Duncan brought the gunshot wound to the attention of an unidentified Hartford police officer at the scene, who agreed that it appeared to be a gunshot wound.

The habeas court additionally found that a jury could have determined that Fleury, who was not at the scene but who was the owner of the Ford involved in the accident, spoke with Fournier after he had arrived home from the hospital. When she inquired about what had happened, Fournier told her that "there had been an incident with three Hispanic males and a gun."

The petitioner's trial counsel, David Smith, testified at the habeas hearing that he was aware of these four witnesses, and had reviewed all of their

statements prior to the petitioner's trial. Smith testified that he decided not to "[create] a specter of manslaughter with a firearm" by presenting these witnesses for two reasons: (1) he determined that there was no evidence to support the theory of the involvement of a gunman because there was no forensic evidence of a gunshot wound; and (2) he did not want to introduce the possibility that a gun had been involved in the incident for fear that it might "increase the likelihood of a penalty range" for the petitioner. Smith offered this justification, however, to explain only his failure to call Young-Duncan and Gartley as witnesses.

As to Davis, Smith testified that he did not call him because Davis could not be located.[5] Smith also appeared to believe that Davis' testimony could not assist in the defense of the petitioner. Specifically, Smith testified that "Davis, although he was there [at the scene], his existence or nonexistence either way did not . . . hurt [the petitioner] because he didn't say he saw someone else do something. He didn't say he saw [the petitioner] do anything." As to Fleury, Smith testified that he did not present her testimony because "[s]he was not a witness to the case. . . . [S]he didn't have any impeachment knowledge or evidence that we could have used."

We begin with the applicable standard of review and the law governing ineffective assistance of counsel

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[5] The habeas court found that Smith's investigator did locate Davis. Davis testified at the habeas hearing that he had been contacted by the trial counsel's investigator, and Davis testified that he told the investigator about the gunshot, the Hispanic males and the white vehicle.

claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Sastrom v. Mullaney*, 286 Conn. 655, 661, 945 A.2d 442 (2008).

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland v. Washington*, supra, 466 U.S. 686. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution." *Copas v. Commissioner of Correction*, 234 Conn. 139, 153, 662 A.2d 718 (1995). "As enunciated in *Strickland v. Washington*, supra, 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Sastrom v. Mullaney*, supra, 286 Conn. 662.

The habeas court found the credibility of Davis, Young-Duncan, Gartley and Fleury to be "considerable and compelling" because all four were neutral witnesses who were not meaningfully impeached at the habeas hearing.[6] As a result, the court found that "a jury likewise would have found their testimony to be credible and highly persuasive." On the basis of this testimony, and pursuant to *Strickland v. Washington*, supra, 466 U.S. 686, the habeas court concluded that "it was deficient performance on the part of trial defense counsel not to present this testimony at the petitioner's original trial," and that "it was harmful to the petitioner and constituted inadequate representation to avoid introducing available and credible evidence of a clearly exculpatory nature in an ill-advised effort to avoid any mention of a firearm." The court also concluded that, in the absence of the deficient performance by trial counsel, the exculpatory testimony of these four witnesses could have "induce[d] reasonable doubt in the minds of the jury" and, therefore, "the reliability of the petitioner's conviction has . . . been undermined."

On appeal, the Appellate Court concluded that

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[6] Specifically, the habeas court stated, "[a]t this point, the court needs to comment upon the credibility of the four missing witnesses. In brief, it is considerable and compelling. All four of these individuals are law-abiding citizens; there was no meaningful impeachment of their testimony at the habeas trial; and, none of the witnesses knew or were in any way acquainted or associated with the petitioner. They are completely disinterested, observant, qualified and dispassionate witnesses. All of them have appropriate training that would allow them to make the statements that they did. This court, being in the best position to judge the credibility of the proffered witnesses believes that a jury likewise would have found their testimony to be credible and highly persuasive."

the petitioner had failed to satisfy the performance prong under *Strickland v. Washington*, supra, 466 U.S. 687, because he could not demonstrate that his trial counsel's representation fell below an objective standard of reasonableness. Instead, the Appellate Court determined that trial counsel decided not to call the four witnesses as a matter of trial strategy and held that the habeas court had failed to accord any deference to Smith's tactical decision or his perspective at the time of trial. *Bryant v. Commissioner of Correction*, supra, 99 Conn. App. 443–44. We disagree and conclude that the decision not to call these four witnesses was not a matter of sound trial strategy within the wide range of reasonable professional assistance.

We first address Smith's actions in light of the performance prong. "To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Internal quotation marks omitted.) *State v. Brown*, 279 Conn. 493, 525, 903 A.2d 169 (2006). "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . .

"Judicial scrutiny of counsel's performance must

be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." (Citations omitted; internal quotation marks omitted.) *Strickland v. Washington*, supra, 466 U.S. 688–90.

Accordingly, the question of whether Smith's

actions fell below an objective standard of reasonableness turns on whether his decision not to solicit the testimony of the four witnesses to support the third party culpability defense can be considered sound trial strategy, or whether it constitutes a serious deviation from the actions of an attorney of ordinary training and skill in criminal law. We need not decide whether Smith's failure to elicit the testimony of any particular witness would suffice because *Strickland* directs us to look at the "totality of the evidence before the judge or jury"; id., 695; keeping in mind that "[s]ome errors . . . have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture . . . ." (Internal quotation marks omitted.) *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001), quoting *Strickland v. Washington*, supra, 466 U.S. 695–96; see also *Pavel v. Hollins*, 261 F.3d 210, 228 (2d Cir. 2001) (cumulative weight of flaws deprived defendant of effective assistance of counsel). We therefore consider Smith's failure to present the mosaic of the alternative theory, a third party culpability defense, as supported by the four witnesses.

We first review the standards governing the admissibility of third party culpability evidence, mindful that the petitioner cannot prevail unless he demonstrates that his alternative theory would not be excluded. "It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the

crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." (Internal quotation marks omitted.) *State v. Arroyo*, 284 Conn. 597, 609, 935 A.2d 975 (2007).

"The admissibility of evidence of third party culpability is governed by the rules relating to relevancy." (Internal quotation marks omitted.) *State v. Ortiz*, 252 Conn. 533, 564, 747 A.2d 487 (2000). "Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) *State v. West*, 274 Conn. 605, 625, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005); Conn. Code Evid. § 4-1. Accordingly, in explaining the requirement that the proffered evidence establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party, we have stated: "Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of third party culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt." (Internal quotation marks omitted.) *State v. Smith*, 280 Conn. 285, 304, 907 A.2d 73 (2006). "In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be

relevant to the jury's determination. A trial court's decision, therefore, that third party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt." *State v. Arroyo*, supra, 284 Conn. 609–10.

It is not ineffective assistance of counsel, however, to decline to pursue a third party culpability defense when there is insufficient evidence to support that defense. See *Dunkley v. Commissioner of Correction*, 73 Conn. App. 819, 827, 810 A.2d 281 (2002) (no evidence to support third party claim, in part, because no one at scene implicated alleged third party), cert. denied, 262 Conn. 953, 818 A.2d 780 (2003); see also *Floyd v. Commissioner of Correction*, 99 Conn. App. 526, 531–32, 914 A.2d 1049 (insufficient evidence to substantiate third party claim when predicated on alleged testimony of unlocated drug dealers who were also gang members), cert. denied, 282 Conn. 905, 920 A.2d 308 (2007); *Santiago v. Commissioner of Correction*, 87 Conn. App. 568, 591–92, 867 A.2d 70 (third party statements did not contain sufficient substance to support viable third party claim), cert. denied, 273 Conn. 930, 873 A.2d 997 (2005); *Alvarez v. Commissioner of Correction*, 79 Conn. App. 847, 851, 832 A.2d 102 (insufficient evidence to support third party culpability defense when petitioner called only one witness at habeas hearing who did not even observe shooting), cert. denied, 266 Conn. 933, 837 A.2d 804 (2003); *Daniel v. Commissioner of Correction*, 57 Conn. App. 651, 684, 751 A.2d 398 (testimony not sufficient to raise third party culpability defense because supporting

witnesses' statements were inconsistent), cert. denied, 254 Conn. 918, 759 A.2d 1024 (2000).

In contrast, in the present case, the habeas court found that the testimony of Davis, Young-Duncan, Gartley and Fleury would have worked in concert to create a credible scenario in which the cause of Jones' death was a gunshot wound to the head perpetrated by a small group of unidentified Hispanic males driving a white Cadillac or Lincoln, not the actions of the petitioner. First, Davis' testimony supports three assertions: (1) that prior to the collision, Davis heard a gunshot, possibly from a .22 caliber weapon; (2) that Jones' car was being pursued by a white Cadillac or Lincoln; and (3) that after the collision, an unidentified Hispanic man, with an unidentified object in his hand, exited the white vehicle and briefly approached the accident scene. Moreover, his testimony also undermines the state's theory of the case. Davis was present at the crime scene from the point of impact until the time the police arrived. Yet during that period, Davis did not witness the supposedly savage and deadly beating, which, according to the state's theory, occurred at the same accident scene.[7] Second, Young-Duncan and

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[7] In referring to Jones, Davis responded to defense counsel's questions as follows during the habeas hearing:

"Q. Okay. Did you see anyone drag that person out of the vehicle? "A. No, I did not.

"Q. Did you see anyone beat that person?

"A. No, I did not.

"Q. Did you see anyone kick that person?

"A. No, I did not.

* * *

"Q. Okay. After the collision, did you remain conscious at all time[s]?

Gartley were two trained emergency medical technicians. On the basis of their testimony, a jury reasonably could have concluded that Jones had sustained a gunshot wound to the left temple area of the head, and that the autopsy performed by the state's medical examiner, Arkady Katsnelson, was potentially incomplete or inaccurate. Finally, Fleury's testimony explicitly links the testimony of Davis, with that of Young-Duncan and Gartley. Fleury testified that when Fournier arrived home that night, he stated that he had been involved in "an incident with three Hispanic males and a gun."[8] Moreover, there was no evidence in the record to suggest that any of these witnesses' statements, regarding either the gunshot or the Hispanic males, were influenced by the statements made by the other witnesses regarding those similar observations. When reviewed in its totality, the testimony of these neutral witnesses, each of whom the habeas court found to be credible and highly persuasive, creates a plausible, well supported third party culpability defense. That is, the testimony of these four disinterested witnesses, when considered as a whole, raises more than a "bare suspicion" of third party culpability. *State v. Arroyo*, supra, 284 Conn. 610. Instead, the testimony directly connects a third party to the crime—the small group of unidentified Hispanic

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"A. Yes, I did.

"Q. Did you retain a clear line of vision to the other vehicle?

"A. Yes, I did."

[8] At the habeas hearing, Fleury testified that on the evening in question, Fournier also claimed he and Jones had been "beat up . . . ."

males."[9] We therefore conclude that under our third party culpability rules, the testimony tending to show that the unidentified Hispanic males with a gun were responsible for Jones' death would have been relevant to the jury's determination of whether there existed a reasonable doubt as to the petitioner's guilt. Therefore, the failure to present this relevant, plausible third party culpability defense constituted deficient performance on the part of defense counsel under *Strickland*.

In addition, we conclude that in circumstances that largely involve a credibility contest, as did the petitioner's trial, "the testimony of neutral, disinterested witnesses is exceedingly important." *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995). While each habeas petition for ineffective assistance of counsel relies on its own unique set of facts, various state and federal decisions have addressed analogous circumstances. For example, in *Lindstadt v. Keane*, supra, 239 F.3d 203, the United States Court of Appeals for the Second Circuit concluded that the performance of the defendant's counsel was deficient, namely, because he failed to enter the testimony of two neutral probation officers who would have testified that the defendant's wife, who was the state's chief witness, had made numerous, unsubstantiated allegations of abuse against the

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[9] There is no requirement that the petitioner specifically name the alleged third party perpetrator. See *State v. Echols*, 203 Conn. 385, 389, 393–94, 524 A.2d 1143 (1987) (trial court improperly excluded evidence of third party look-alike despite unknown identity).

defendant in the hopes of having him reincarcerated.[10] See also *Pavel v. Hollins*, supra, 261 F.3d 222–23 (in "credibility contest," performance deficient, in part, because of failure to call neutral court-appointed mediator to support theory that mother manipulated children's testimony in effort to gain full custody); *Siano v. Warden*, 31 Conn. App. 94, 100–105, 623 A.2d 1035 (in conviction based on credibility of testimony of coconspirator, deficient performance for failure to call physician as lone neutral witness to testify that defendant was incapable of crime due to extensive injuries from recent motor vehicle collision), cert. denied, 226 Conn. 910, 628 A.2d 984 (1993).

At trial in the present case, the state's only evidence that specifically connected the petitioner to the assault was predicated entirely on the credibility of the eyewitness testimony of Fournier and Ewan Sharp.[11]

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[10] Interestingly, the other two aspects of the counsel's deficient performance in *Lindstadt* were the failure to show similar inconsistencies between the daughter's and the mother's testimony, and the failure to challenge the only medical evidence that supported the abuse, which was based on an unnamed study. *Lindstadt v. Keane*, supra, 239 F.3d 199–203. Similarly, in the present case, the testimony of Davis would have established inconsistencies with the eyewitness testimony of Fournier and Ewan Sharp, and the failure to offer the testimony of both Young-Duncan and Gartley, left unchallenged the principal medical evidence that supported the state's theory.

[11] We recognize that the strength of the state's case bears most significantly to our analysis under the prejudice prong of *Strickland*. The Supreme Court cautioned in *Strickland*, however, that "the principles we have stated do not establish mechanical rules." *Strickland v. Washington*, supra, 466 U.S. 696. With that guidance in mind, we further observe that inherent in an analysis

Fournier admitted that he had lied to the police during the investigation and that he had consumed approximately eighteen beers and an unknown quantity of cocaine on the night of the incident. Detective Steven Grabowski of the Hartford police department testified that, at the time, Fournier was "very uncooperative [and] intoxicated . . . ." A jury could have found that Sharp's testimony was equally suspicious. Sharp did not come forward until four years after the fact, and only while undergoing police interrogation for an unrelated felony. Moreover, the testimony of Fournier and Sharp was inconsistent as to critical facts: Fournier testified that the petitioner assaulted him in addition to attacking Jones, whereas Sharp testified that the petitioner did not assault Fournier. In the absence of the third party culpability evidence presented by neutral, credible witnesses, however, the jury was not presented with a plausible alternative to Sharp and Fournier's descriptions of the events.

In short, Smith's performance was deficient. The alternative theory raising a third party culpability defense was well supported by neutral, credible witnesses,[12] whose statements were made

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of whether counsel's actions were deficient, in part, because of a failure to call neutral witnesses in a credibility contest, there must be some initial inquiry into whether such a contest in fact existed. Accordingly, we set forth only so much with respect to the credibility of the state's two eyewitnesses to establish that such a credibility contest was present at the petitioner's trial.

[12] We also find it persuasive that the testimony of these four witnesses, three of whom were eyewitnesses and all of whom were independent, was not cumulative of the testimony of the only two

contemporaneous to the events.[13] This was not an alternative theory concocted years later by a defendant in a jailhouse cell, unsupported by credible evidence. Under our third party culpability rules, we conclude that the evidence was relevant, and could have raised a reasonable doubt in the minds of the jury as to the petitioner's guilt. The testimony would have called into question the most basic elements of the state's case: (1) that the petitioner was the individual who killed Jones; and (2) that Jones died as a result of a beating. In the light of all the circumstances, including the dubious credibility of the state's two eyewitnesses, the decision not to present the third party culpability defense fell below an objective standard of reasonableness, and,

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witnesses presented by trial counsel as part of the petitioner's defense, namely, a police officer, who testified that there was a police substation near the scene of the incident from which outdoor camera footage requests were never made, and the petitioner himself, who testified as to his presence at the scene. No witnesses at trial testified about gunshots, the presence of a white car and the unidentified Hispanic males, or to a possible gunshot wound to Jones. Cf. *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998) (per curiam) (witness would have corroborated another witness' testimony and counsel could have determined witness would have been unnecessarily cumulative), cert. denied sub nom. *Parise v. United States*, 526 U.S. 1164, 119 S. Ct. 2059, 144 L. Ed. 2d 224 (1999).

[13] Young-Duncan, Gartley and Fleury's statements were made to police on the day in question. While police also took Davis' statement on the day in question, that statement does not contain the statements regarding the circumstances surrounding the gunshot. Davis testified at the habeas hearing that the police were not interested in memorializing that portion of his account. He also testified that he told his full account to the petitioner's investigator. Moreover, Davis' original statement to police does not contain any account of an assault by the petitioner.

therefore, constituted deficient performance under the principles enunciated in *Strickland*.[14]

We are not persuaded by the state's argument that deference to trial strategy saves Smith's actions. While we acknowledge that the decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel; see *State v. Gore*, 288 Conn. 770, 779 n.9, 955 A.2d 1 (2008); it does not follow necessarily that, in every instance, trial counsel's strategy concerning these decisions is sound. As we have demonstrated previously in this opinion, in light of an objective standard, Smith's

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[14] The Appellate Court buttressed its conclusion that the petitioner did not satisfy the performance prong of *Strickland* because "[t]he petitioner did not indicate in either of his statements to the police, or in his testimony at his criminal trial, that there was an unknown gunman involved in the April 14, 1996 incident. Therefore, the presentation of a defense regarding an unknown gunman would have been rendered implausible by the petitioner himself. In fact, the [habeas] court noted that 'the petitioner's own testimony . . . seems to contradict the existence of [the] white Cadillac and a shooting . . . .' " *Bryant v. Commissioner of Correction*, supra, 99 Conn. App. 443. We disagree. Although the petitioner's trial testimony, and his statements to the police, do not reference a gunshot, a white vehicle or any Hispanic males, we do not view the absence of such information to be directly contradictory. If the petitioner had testified that there was no gunshot, that Jones had not been shot or that there was no white car in the area, that testimony would have been directly contradictory. It is possible, however, that the petitioner simply did not hear the gunshots or see the white vehicle and unidentified Hispanic males while he was hanging onto, or had just fallen off of, Fournier's Ford, which, according to Davis, was traveling between thirty-five and forty-five miles per hour. More importantly, as the habeas court noted, the petitioner may have chosen not to testify at all if these four witnesses had been presented at trial.

decision not to present these witnesses was unreasonable.[15]

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, supra, 466 U.S. 691. To satisfy the second prong of

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[15] We briefly address the explanations proffered by Smith at the habeas hearing to the extent that the Appellate Court relied on those explanations to conclude that Smith's action constituted reasonable trial strategy. Smith claimed that: (1) he did not want to introduce the witnesses because evidence of a gun may have increased the petitioner's penalty range; and (2) the testimony of a gunshot, as established by Young-Duncan and Gartley, was unsupported by other evidence. First, the state did not charge the petitioner with the use of a firearm. Moreover, because manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a is not a lesser included offense of murder when the information does not allege that the murder was, in fact, committed with a firearm; *State v. Greene*, 274 Conn. 134, 159–60, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006); Practice Book § 36-18 would likely have prohibited the state from amending the charges against the petitioner. See *State v. Ramirez*, 94 Conn. App. 812, 817, 894 A.2d 1032 (Practice Book § 36-18 provides that state may amend information after commencement of trial as long as "no additional or different offense is charged and no substantive rights of the defendant would be prejudiced" [internal quotation marks omitted]), cert. denied, 278 Conn. 915, 899 A.2d 612 (2006). Second, the testimony of Young-Duncan and Gartley, which established the possibility of a gunshot wound, was, in fact, supported by other witnesses, namely, Davis, who testified that he heard gunshots immediately prior to the collision and who thereafter witnessed an unidentified Hispanic man with an object in his hand, and Fleury, who testified that Fournier stated that he had been involved in an incident with "three Hispanic males and a gun."

Strickland, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, "there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal." *Bunkley v. Commissioner of Correction*, 222 Conn. 444, 454, 610 A.2d 598 (1992), overruled in part on other grounds by *Small v. Commissioner of Correction*, 286 Conn. 707, 946 A.2d 1203 (2008). The second prong is thus satisfied if the petitioner can demonstrate that there is "a reasonable probability that, but for that ineffectiveness, the outcome would have been different." *Summerville v. Warden*, 229 Conn. 397, 430, 641 A.2d 1356 (1994); see also *Siano v. Warden*, supra, 31 Conn. App. 98.

Because the Appellate Court concluded that the petitioner had failed to satisfy the performance prong of *Strickland*, it did not reach the question of prejudice. The habeas court, for its part, concluded that, based on its findings, "there is clearly sufficient reason to doubt the reliability of [the jury's] verdict, based as it is upon incomplete evidence." We agree.

Foremost, while it is not necessary to repeat our analysis addressing the performance prong, suffice it to say that the third party culpability defense, as supported by the testimony of Davis, Young-Duncan, Gartley and Fleury, likely would have permeated to some degree every aspect of the trial and raised a reasonable doubt in the minds of the jury as to the

petitioner's guilt.[16] See *Strickland v. Washington*, supra, 466 U.S. 695–96 ("[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture"). That theory, when juxtaposed with the testimony of Fournier and Sharp, creates great doubt in the validity of the jury's verdict. See id., 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

As we previously have noted, in the present case, the only evidence directly connecting the petitioner to the attack was the eyewitness testimony of Fournier and Sharp. The record reveals, however, that both witnesses were subject to substantial impeachment evidence. First, Sharp never made a statement to police on the night of the incident, but rather made his statement four years later and only during an interrogation by the Hartford police department subsequent to an unrelated felony arrest. Only at that point did Sharp tell the police that he had witnessed the

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[16] We conclude that, even assuming that the use of Fleury's statement would be limited to impeachment purposes, pursuant to § 6-10 of the Connecticut Code of Evidence, the testimony of Davis, Young-Duncan and Gartley, coupled with that impeachment testimony, would have been sufficient to undermine the jury's verdict. Accordingly, and in light of the fact that Smith did not even attempt to introduce Fleury's statement, we need not reach the question of whether Fleury's statement would also have been admissible for substantive purposes. Rather, we leave that determination to the discretion of the trial court on remand.

petitioner beating Jones.[17] Sharp then testified at the petitioner's probable cause hearing in a manner largely consistent with the facts, as noted previously, that the Appellate Court relied on to reverse the habeas court. When it was Sharp's turn to testify at trial, however, Sharp refused. After the prosecutor offered Sharp transactional immunity, Sharp continued to refuse to testify and subsequently was held in contempt of court. Thereafter, the state read Sharp's probable cause testimony into the record. Second, at the time of the probable cause hearing, Sharp testified that he had four prior felony convictions, and had charges pending against him. Finally, Sharp testified that, at the time he allegedly witnessed the events, he was fourteen years old and was under the influence of marijuana.

Fournier's testimony was also vulnerable to impeachment evidence. To begin, on the night in question, Fournier also did not make any statements to police asserting that the petitioner had attacked Fournier or Jones. When police recontacted Fournier on or about February 21, 1997, he again failed to make any statements alleging an attack by the petitioner.[18] While on the witness stand, Fournier testified that he had at least one prior felony conviction and had various charges pending against him. In addition, Fournier admitted that at the time of the incident it was his and

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[17] Sharp testified that he did not give a statement to the police on the night in question.

[18] Fournier eventually testified in a manner consistent with the facts as noted by the Appellate Court.

Jones' intention to solicit the sale of cocaine and depart without paying for the contraband. Even more remarkable, Fournier testified on cross-examination that he had consumed as many as eighteen beers and an unknown quantity of cocaine on the night of the incident. Fournier then testified that he had lied to the police on multiple occasions during their investigation, specifically, that he had been the passenger and not the driver of the Ford,[19] and that he had given a false name to the police to avoid arrest on an outstanding warrant. Most importantly, as noted previously, the testimony of Sharp and Fournier diverged in one significant respect: Fournier testified that the petitioner had kicked him several times prior to the petitioner's alleged beating of Jones, whereas Sharp testified that he witnessed the entire incident and that Fournier "didn't get beat up. He was down by the package store."

Accordingly, not only was the testimony that linked the petitioner to the attack of dubious credibility, it also was internally inconsistent with respect to significant facts. While Katsnelson's testimony and report admittedly were strong evidence, they were not conclusive of the petitioner's guilt. Without the jury crediting the testimony of Sharp and Fournier, Katsnelson's conclusion that Jones died of blunt trauma, assuming it is correct, only supports the conclusion that Jones died of blunt trauma—it does not prove that the petitioner committed the attack. Nothing in the autopsy report permitted Katsnelson to point to the petitioner as the assailant, nor did Katsnelson do so

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[19] Fournier testified that he lied in order to avoid arrest for driving with a suspended license.

at trial. As a result, the failure to challenge the testimony of Fournier and Sharp with neutral, disinterested testimony was exceedingly damaging to the petitioner's defense.

Moreover, Katsnelson's testimony was not irrefutable. Though Katsnelson observed various injuries suffered by Jones that he concluded were inconsistent with a motor vehicle accident,[20] and testified that he did not find evidence of a gunshot wound,[21] the failure to call Young-Duncan and Gartley left Katsnelson's conclusion largely uncontested.[22]

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[20] At the time of the autopsy, Katsnelson was under the belief that Jones had been the driver. As it later turned out, Jones was in fact the passenger.

[21] The habeas court addressed this conclusion by observing that "[i]t is not impossible that with the force of the impact of the collision, coupled with a gunshot wound to the head, and emergency treatment at the trauma center that a severe fracturing of the skull might have masked the existence of the gunshot wound by the time of the postmortem examination."

[22] It is important to remember that Katsnelson's bald assertion that he "did not find any evidence of gunshot wounds" was never subjected to scrutiny on cross-examination. For example, Katsnelson was never asked whether he also had observed the wound that the two emergency medical technicians (and an unidentified Hartford police officer) believed was a gunshot wound, and, thus, never provided an explanation as to whether their belief was correct or incorrect. While Smith did cross-examine Katsnelson on his foundation, including: (1) his failure to assess the damage to the Ford; (2) his failure to visit the scene; (3) his failure to perform an accident reconstruction; and (4) his mistaken belief that Jones was the driver and not the passenger, the inclusion of the exculpatory testimony would have given the jury a strong basis to question Katsnelson's conclusion. We would also note that,

Without that testimony, the jury never had to reconcile how two trained emergency medical technicians observed a pencil sized entry and exit gunshot wound to the head moments after their arrival at the scene. Perhaps most importantly, while it is difficult to understand how the autopsy did not reveal a gunshot wound, it is equally difficult to explain how Davis, a former Marine and disinterested witness, who saw the entire incident, and testified that at no time did he lose consciousness, never saw a supposedly savage and deadly beating taking place in his presence.

On the basis of the foregoing, we conclude that but for the deficient performance of the petitioner's trial counsel, there was a reasonable probability sufficient to undermine confidence in the jury's verdict; *Strickland v. Washington*, supra, 466 U.S. 694; and, as a result, the petitioner received ineffective assistance of counsel in violation of his rights under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution.[23]

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significantly, defense counsel's reasons for not presenting these witnesses in the context of impeachment as well as a third party culpability theory are inadequate and unsatisfactory. See footnote 15 of this opinion. Defense counsel, who improperly feared introducing evidence of a gunshot, failed to offer the obvious challenges to Katsnelson's report.

[23] The concurring opinion emphasizes that one of our two grounds for reversing the judgment of the Appellate Court is that the testimony of the four witnesses, Davis, Young-Duncan, Gartley and Fleury, who were not called by defense counsel, would have supported a viable third party culpability defense. On the basis that such a defense may have been "weak," the concurring opinion argues that failing to call the witnesses for that purpose was not

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the habeas court.

In this opinion NORCOTT and VERTEFEUILLE, Js., concurred.

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ineffective assistance. While we disagree with the concurring opinion's characterization as to the strength of the third party defense, we also observe that the concurring opinion fails to note with appropriate emphasis that the other ground for reversal is that the failure to present those witnesses relinquished the opportunity for substantial impeachment of the state's case. Apparently, however, the concurrence is in accord on this ground, although it focuses solely on the testimony of one witness, Davis, whose absence alone, it argues, supports the showing of ineffective assistance of defense counsel. It is indisputable, in fact, that Davis is the principal witness whose testimony would directly support a third party culpability defense, as well as would impeach the testimony of various state's witnesses.

In response to the concurrence's conclusion that the majority opinion somehow "require[s]" future defense counsel to present a third party culpability defense or even that defense counsel will "be obligated" to raise it, we clarify that future defense counsel is by no means so "obligated" or "require[d]." Addressing the issue raised on appeal involves a retrospective view of the earlier trial and a determination that the failure to present the testimony of these exculpatory witnesses was not effective representation. The point is that defense counsel did not offer available evidence that would have countered both the state's claims that the petitioner was the assailant and that the victim was beaten to death. Defense counsel at a future trial, which, doubtless, will take place under substantially different circumstances, is free to proceed on the basis of his or her own assessment of the available evidence and, ultimately, his or her own judgment as to how to make use of this evidence.

SUPREME COURT

STATE OF CONNECTICUT

NO. SC 17896

BERNALE BRYANT

v.

COMMISSIONER OF CORRECTION : APRIL 21, 2009

ORDER

THE MOTION OF THE RESPONDENT-COMMISSIONER OF CORRECTION, FILED MARCH 25, 2009, FOR RECONSIDERATION AND REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D **DENIED.**

BY THE COURT,
/s/ L. Jeanne Dullea

_____
ASSISTANT CLERK-APPELLATE

NOTICE SENT: APRIL 22, 2009
PETER TSIMBIDAROS, SPECIAL PUBLIC DEFENDER
MICHAEL E. O'HARE ASSISTANT STATE'S ATTORNEY
HON. STANELY T. FUGER, JR.
CLERK, JUDICIAL DISTIRCT TOLLAND AT SOMERS
(CV-030003933S)

bjm 376/080390

(2)

No. 09-84

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Brian L. Murphy — PETITIONER
(Your Name)

VS.

Brandi Bryant — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Court of Appeals Court
Court of Superior Court

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Brandi Bryant
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Berenice Bravo, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ N/A	$ N/A	$	$
Self-employment	$ N/A	$ N/A	$	$
Income from real property (such as rental income)	$ N/A	$ N/A	$	$
Interest and dividends	$ N/A	$ N/A	$	$
Gifts	$ N/A	$ N/A	$	$
Alimony	$ N/A	$ N/A	$	$
Child Support	$ N/A	$ N/A	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ N/A	$ N/A	$	$
Disability (such as social security, insurance payments)	$ N/A	$ N/A	$	$
Unemployment payments	$ N/A	$ N/A	$	$
Public-assistance (such as welfare)	$ N/A	$ N/A	$	$
Other (specify):	$ N/A	$ N/A	$	$
Total monthly income:	$ 0	$ N/A	$	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
N/A			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
N/A			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		$	$
N/A		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. N/A

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model _____
Value N/A

☐ Motor Vehicle #2
Year, make & model _____
Value N/A

☐ Other assets
Description _____
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$ N/A
Home maintenance (repairs and upkeep)	$ N/A	$ N/A
Food	$ N/A	$ N/A
Clothing	$ N/A	$ N/A
Laundry and dry-cleaning	$ N/A	$ N/A
Medical and dental expenses	$ N/A	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ N/A	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ N/A	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$ N/A
Life	$ N/A	$ N/A
Health	$ N/A	$ N/A
Motor Vehicle	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ N/A	$ N/A
Credit card(s)	$ N/A	$ N/A
Department store(s)	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Alimony, maintenance, and support paid to others	$ N/A	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A
Total monthly expenses:	$ N/A	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid--or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July, 2009

Brenda Bryant
(Signature)

QUESTION PRESENTED

Whether the petitioner fails to present an issue, based on the trial record, worthy of consideration by this Court.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

NATURE OF PROCEEDINGS 1

LACK OF JURISDICTION 1

STATEMENT OF CASE 2

A. Mr. Bryant's Probable Cause Hearing 2

B. Mr. Bryant's Criminal Trial 3

C. Mr. Bryant's Habeas Trial 14

REASONS FOR DENYING WRIT 20

I. THE FACTUAL SCENARIO PRESENTED BY THE PETITIONER ACTUALLY SUPPORTS THE REASONABLENESS OF THE FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*. THIS FACTUAL SCENARIO REVEALS THAT THE QUALITY OF THE EVIDENCE PRESENTED BY THE PROSECUTION TO CONVICT THE RESPONDENT WAS WEAK AND EASILY IMPEACHABLE 22

A. The Fact Based Argument Presented by the Petitioner Is Flawed 22

1. The petitioner neglects the essential fact that Fournier necessarily had company on the stoop who, unlike Fournier, did not witness the respondent assault the deceased 24

2. The time-frame of the sequence of events renders the petitioner's factual scenario implausible 26

II. THE EXCULPATORY EVIDENCE WHICH DEFENSE COUNSEL FAILED TO UNEARTH AND THEN PRESENT WOULD HAVE IMPEACHED THE PROSECUTION'S CASE, WOULD HAVE ESTABLISED A SUCCESSFUL DEFENSE OF THIRD PARTY CULPABILITY, AND WOULD HAVE BOLSTERED THE RESPONSENT'S DEFENSE THAT HE DID NOT COMMIT THE OFFENSES AS CHARGED. THE PETITIONER'S FLAWED CLAIMS MUST FAIL UNDER A *STRICKLAND* ANALYSIS.....27

CONCLUSION..... 36

RESPONDENT'S APPENDIX

TABLE OF AUTHORITIES

CASES PAGE

Bigelow v. Williams, 367 F.3rd 562 (6th Cir. 2004)..... 34,35

Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990)..... 21

Brecht v. Abrahamson, 507 U.S. 619 (1993)..... 22

Brady v. Maryland, 373 U.S. 83 (1963)..... 19,22

Bunkley v. Commissioner of Correction, 222 Conn. 444 (1992)..... 22

Code v. Montgomery, 799 F 2d. 1481 (11th Cir. 1986)..... 34

Copas v. Commissioner of Correction, 234 Conn. 139 (1995)..... 32

Consiglio v. Warden, 153 Conn. 673(1966)..... 33

Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cir. 1984)..... 36

Fay v. Noia, 372 U.S. 391 (1963)..... 21

Gaines v. Manson, 194 Conn. 510 (1984)..... 22

Gideon v. Wainwright, 372 U.S. 335 (1963)..... 20

Harris v. Nelson, 394 U.S. 391 (1969)..... 33

Harris v. Reed, 894 F2d. 871 (7thCir. 1990)..... 29,34

Jackson v. Virginia, 443 U.S. 307, 332 (1979)..... 22

Johnson v. Zerbst, 304 U.S. 458 (1938)..... 21

Jones v. Cunningham, 371 U.S. 236, 243 (1963)..... 21

Kimmelman v. Morrison, 477 US 365, 386 (1986..... 32

Lindstadt v. Keane, 239 F.3d 191,205 (2nd Cir. 2001)..... 31

Lozada v. Warden, 223 Conn. 834 (1992)..... 22

McMann v. Richardson, 397 U.S. 759 (1970)..... 20

Pavel v. Hollins, 261 F.3d 210, 220 (2nd Cir. 2001)..... 31,34

Pointer v. Texas, 380 U.S. 400, 403 (1965)..... 20

Safford v. Warden, 223 Conn. 180, 612 A.2d 1161 (1992)..... 22

Santiago v. Commissioner, 90 Conn. App. 420, 425 (2005)..... 32

Siano v. Warden, 31 Conn. App. 94, 623 A.2d 1035 (1993)..... 29

Simcon v. Stoughton, 184 Conn. 547 (1981)..... 34

Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984)..... 36

State v. Arroyo, 284 Conn. 597 (2007)..... 29

State v. Guiere, 184 Conn. 400 (1981)..... 29

State v. Marshall, 166 Conn. 593 (1974)..... 29

Strickland v. Washington, 466 U.S. 668 (1984)..... 20,21,22,27,31,32

Summerville v. Warden, 229 Conn. 397 (1994)..... 21,30

Taylor v. Commissioner, 284 Conn. 433 (1981)..... 31,32

United States v. Agurs, 427 U.S. 97,104 (1976)..... 33

United States v. DeCoster, 487 F.2d 1197 (CADC 1973)..... 36

Valeriano v. Bronson, 209 Conn. 75 (1988)..... 33

Washington v. Smith, 219 F.3d 620, 631 (7th Cir. 2000)..... 36

Wiggins v. Smith, 539 U.S. 510 (2003)..... 28,29,34,36

Williams v. Washington, 59 F.3d 673 (7th Cir. 1995)..... 28

STATUTES PAGE

U.S.C. Section 1257 (a)..... 1

Connecticut General Statutes Section 53a-54a (a)..... 1

Connecticut General Statutes Section 53a-55..... 1

Connecticut General Statutes Section 53a-55a..... 33

CONSTITUTIONAL PROVISIONS PAGE

Sixth Amendment to the United States Constitution..... 20,27,36

Fourteenth Amendment to the United States Constitution..... 20,36

Constitution of the State of Connecticut..... 20,27

Connecticut General Statutes Section 53a-54a (a)..... 1

Connecticut General Statutes Section 53a-55..... 1

Connecticut General Statutes Section 53a-55a..... 33

CONSTITUTIONAL PROVISIONS PAGE

Sixth Amendment to the United States Constitution..... 20,27

Fourteenth Amendment to the United States Constitution..... 20

Constitution of the State of Connecticut..... 20,27

NATURE OF THE PROCEEDINGS

Bernale Bryant was arrested on January 27, 2000 for an incident alleged by the prosecution to have occurred on April 13, 1996 and was charged in count one with murder in violation of General Statutes Section 53a-54a (a). Two immediate factors preceded his arrest. First, on January 25, 2000 an alleged witness with a long felony record, Ewan Sharp, was arrested for an unrelated robbery and while in police custody he proffered that he had information about the 1996 incident. Second, Mr. Bryant had filed a police brutality claim in December of 1999 against the same police department for a severe beating he suffered during an unrelated arrest. The prosecution at the criminal trial alleged the deceased died from a beating. The jury deliberated for three days and convicted Mr. Bryant of the lesser included offense of manslaughter in the first degree in violation of Connecticut General Statutes Section 53a-55(a)(1).

Mr. Bryant's conviction was overturned after full trial by the habeas court in which Mr. Bryant presented a multitude of exhibits and witnesses, whilst the respondent presented two exhibits, one of which was an autopsy report. On March 8, 2005, Fuger, J., granted the writ of habeas corpus which alleged ineffective assistance of counsel after four days of trial. The Connecticut Supreme Court reversed the Appellate Court thereby affirming the judgment.

LACK OF JURISDICTION

The petitioner claims this Court has jurisdiction pursuant to U.S.C. Section 1257(a) and Supreme Court Rule 10(c) to hear this case. The respondent disagrees. The Connecticut Supreme Court did not decide an important federal question in a way that conflicts with the relevant decisions of this Court. This Court lacks jurisdiction.

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STATEMENT OF CASE

A. Mr. Bryant's Probable Cause Hearing

The prosecution alleged the incident occurred at approximately 1:30 am on April 14, 1996. The Hartford Police questioned Mr. Bryant two days later. The case remained dormant for several years. The timing of his arrest is suspect. In December of 1999, Mr. Bryant filed a brutality claim against the Hartford Police Department alleging that members of the police severely beat him. 1/19/05 Habeas Trial Tr. at 95. The same police department arrested Ewan Sharp for an unrelated armed robbery on January 25, 2000. The prosecution alleged Mr. Sharp proffered a statement against Mr. Bryant on that day. Two days later, the Hartford Police arrested Mr. Bryant.

A probable cause hearing ensued. On March 30, 2000 at the hearing, the prosecution sought to illicit testimony from Ewan Sharp. The probable cause court afforded Sharp counsel, Attorney Sexton. Sharp initially refused to testify so the prosecutor reminded Sharp of his pending charges in a downstairs courtroom. 3/20/2000 Probable Cause Tr. at 71. Sexton intimated Sharp's refusal was based on his fear of self-incrimination. Id. at 72. Transactional immunity was offered which Sexton represented was not sufficient. So the prosecution in return furnished complete, absolute testimonial immunity which Sharp accepted. The prosecution requested a recess for the express purpose "to prepare" Sharp for his testimony. Id. at 79.

Sharp testified that the Hartford Police arrested him for his involvement in an unrelated armed robbery case. Id. at 80. He had amassed at least four prior felony convictions. Sergeant Stephen Grabowski, the lead detective in Mr. Bryant's case, and other members of the police interrogated him in custody and asked if he had any useful

information to help them in other cases. The police directed his attention during this intense interrogation to Mr. Bryant and a motor vehicle accident in April of 1996. Id.

On the day in question, Sharp claimed to have been on Magnolia Street waiting by a pay phone.[1] Sharp's version of events resembled a scene from The Terminator series of movies. He saw a Ford Escort racing off at a high rate of speed with Mr. Bryant holding onto it about a block away. The Escort collided with an SUV in a devastating, fiery collision. Sharp claimed he walked to the mangled Escort and got as close as three arm lengths from it. Sharp then saw Mr. Bryant walking towards the Escort. Id. at 125, 141. Sharp claimed the passenger exited the vehicle on his own volition "holding his head and looking dizzy." Id. at 85. Mr. Bryant then snatched the driver who was already "all bloody and stuff" from the impact out of the driver's side window and proceeded to punch and kick him. Id. 85, 125. The alleged assaults lasted five seconds. The assault failed to produce any visible injuries or blood to the victim as he looked the same after the alleged assault as he did before it.[2] Id. at 128. He claimed it did not rain and the road was "dry." Id. at 99.

B. Mr. Bryant's Criminal Trial

Probable cause was found and the prosecution proceeded to try Mr. Bryant by jury. The prosecution sought to call Sharp again, but notified the court of an issue not appropriate for the jury. The trial court excused the jury. Sharp stated that his refusal to testify was based on the fear of self-incrimination. The prosecution had favorable resolved his charges earlier. Attorney Sexton represented in the absence of

[1] Sharp testified he was high and under the narcotic effects of marijuana at the time of the incident. 3/30/2000 Probable Cause Tr. at 137. He "didn't remember a lot" about the incident and his pronounced daily use of illicit drugs created what he termed "blanks" in memory which "can't be filled." Id. at 146.
[2] Sharp's testimony is in total contradiction to what the petitioner presents in page 7 of its petition.

the jury that in her view "perjury would be an exception to that grant of immunity" which is a clear indication Sharp's probable cause testimony was perjured and wholly unreliable. Id. at 460. Sexton eliminated any confusion as to Sharp's motive to refuse to testify: "I have reason to believe that his testimony will differ...[a]nd for those reasons he's asserting his privilege based on the possibility of prosecution for perjury and the possibility of a prosecution for false statement [in] the second degree." Id. at 468-469. A recess was taken. Sexton represented that Sharp's earlier probable cause testimony was perjured. Sharp continued to refuse to testify despite another offer of absolute immunity and a six month sentence of contempt of court. The prosecution sought to introduce Sharp's probable cause hearing testimony. The trial court notified counsel that it would decide the issue the following day. The jury was unaware.

On the following day, Attorney Sexton reported to the trial court in the jury's absence that Sharp had not wavered. 10/18/2000 Trial Tr. at 587. Defense counsel had ample time to brief the admissibility of Sharp's prior testimony before its admission, but he did not. The prosecution read the transcript in its entirety to the jury.

The state presented Gary Fournier. Fournier testified that on April 13, 1996 he was living with his fiancée, Renee Fleury. Fleury was at work and unaware of his indiscretions. 10/18/2000 Trial Tr. 605. He and the deceased started a drug and cocaine binge at around 6:00 pm at a bar in Manchester. Around midnight, they needed more cocaine so Fournier drove Fleury's car to Albany Avenue in Hartford where he had purchased illegal drugs on at least five prior occasions. The deceased rode as the passenger. Id. at 610, 633. Fournier testified that he refused to pay so he sped off. He ran a stop sign and a "Jeep Cherokee hit [him] on the driver's door." Id. at

614. The Escort spun, hit a telephone pole, and came to rest with the driver's door lodged against the pole and both airbags imploded. Id. at 615. Fournier claimed that Mr. Bryant dragged him out of the driver's side window and kicked him repeatedly. Fournier testified that he made his way to the stoop of Blanche's, a nearby liquor store, without assistance where the passenger was then allegedly dragged through the driver's side window.[3] Id. at 678.

Sergeant Stephen Grabowski testified that he attempted to interview Fournier at the hospital. Fournier had sought medical treatment under the assumed name of "Leonard Fournier" due to various warrants out for his arrest. Id. at 621. Fournier was intoxicated and very uncooperative. 10/18/2000 Trial Tr. 707. Fournier escaped the hospital in fear of arrest. He made his way back to his financee's, Ms. Renee Fleury's, apartment.

Grabowski ran the plate and learned the Escort was registered to Fleury. Grabowski met with Fleury. She provided him with Fournier's real first name and whereabouts. Grabowski took a written statement from her. The statement indicates Fournier stated shortly after the incident that "*three Spanish guys with guns*" were involved in the incident. Appendix A-4. She directed him to her apartment. Id. at 707. Grabowski interviewed Fournier and took him into custody. The jury was never made aware of Fournier's statement about the three Spanish males with guns.

Fournier furnished a statement once in police custody on April 15, 1996. Grabowski charged Fournier with criminal impersonation and interfering with police.

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[3] This was not possible as according to police testimony the driver's door was lodged against the telephone pole. 4/7/2000 Probable Cause Tr. at 157.

The statement had two significant contradictions to his eventual trial testimony. First, in Fournier's statement, he told the Hartford Police that he was the passenger and that the deceased was the driver. Second, Fournier's statement reveals that he was purchasing drugs from a person known as "T Time," not Mr. Bryant. Fournier testified to two reasons why he lied to the police when he gave his statement: he did not hold a valid driver's license at the time of the incident and he had several outstanding warrants. Fournier likewise supplied a motive for testifying in a manner beneficial to the prosecution. He had an open criminal matter with the same prosecutor's office scheduled for five days after he testified on October 23, 2000. Id. at 663.

Fournier was asked during his testimony about his location when he supposedly saw the deceased being dragged from the car. He responded that: "he was just getting up on his hands and knees. And the car isn't a *Cadillac*. I mean it's a Ford Escort." *Emphasis* added, Id. at 689. Unfortunately, defense counsel did not pick up on what appeared to be a "Freudian slip." A slip because, as the habeas trial would bring to light, a white Cadillac or Lincoln would fit prominently into the case.

Fournier mentioned "T-Time," but not Mr. Bryant in the statement which he furnished to the police on April 15, 1996. Members of the police were familiar with "T-Time" aka Terry Davis, so Grabowski interviewed him in April of 1996. "T-Time" confirmed that Mr. Bryant was at the scene.

The prosecution presented the drug dealer referred to as "T-Time" who testified that he was at the scene selling drugs on the street.[4] His recollection of the events was

[4] The trial court suggested to defense counsel that it would be appropriate to issue a curative instruction to the jury to protect Mr. Bryant from "T-Time's" prior misconduct. Defense counsel declined. The trial

foggy; he had smoked crack cocaine throughout that day. 10/16/2000 Trial Tr. at 335. He saw the Escort approaching him. The occupants who he recognized from previous drug deals signaled to him. A fair amount of time passed as T-Time continued to speak with the driver. Id. at 313. He saw Mr. Bryant walk towards the passenger side of the car, lean against it, and engage the passenger in conversation. The car suddenly raced off with Mr. Bryant hanging onto it for a short distance. Immediately following the collision, he saw Mr. Bryant stumbling in the opposite direction of where the Escort had stopped. Id. at 315. That would be the last he saw of Mr. Bryant. He never saw Mr. Bryant assault Fournier or the deceased. "T-Time" then saw the passenger, who he identified as the deceased, lying on the ground. He saw someone assisting Fournier over to the stoop of a nearby liquor store. A crowd of at least 20 people had gathered before the ambulance arrived. Id. at 320.

The prosecution presented limited testimony from Jimmy Green who on the day of the incident was working as a security guard for Metro Loss Prevention. He and fellow security guard Gloria Brown were on duty at an apartment complex at the corner of Vine and Albany Avenues when they heard a bang.[5] 10/16/2000 Trial Tr. at 292-293. Then, he heard a second, louder and different sounding bang. Id. Fifteen to twenty seconds later, he receives a call over the company radio. Id. at 293.

Mr. Green further testified that his field supervisor, Thomas Davis, had placed the call moments after the collision and it took a matter of seconds to cover the short

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court in the absence of the jury voiced a disagreement with counsel's "trial methods" and their prejudice on Mr. Bryant. 10/16/2000 Trial Tr. at 359.

[5] A proper investigation by defense counsel would have revealed that the source of the first "bang" was gunfire from a .22 caliber handgun and the source of the second was the collision of vehicles. Green's supervisor, Thomas Davis, would later confirm this at the habeas trial. 1/19/2005 Habeas Trial Tr. at 14.

distance. Id. at 285. Green immediately made his way to the Escort. He saw a man, presumably the deceased, lying on the ground and a second man, Fournier, staggering out of the vehicle. Green and Brown assisted Fournier to the stoop of Blanche's Liquor Store. Id. at 288. Mr. Green did not see Mr. Bryant at the scene. Id. at 295-296.

The first officer to respond from the was Officer Garth Perri. He was dispatched to respond to a motor vehicle accident. The ambulance was present upon his arrival and two medical professionals, John Gartley and Melissa Young-Duncan, were treating the deceased. 10/16/2000 Trial Tr. at 242-243. Perri saw Fournier sitting on a stoop of the liquor store. The road was wet as it had rained heavily. Id. at 270.

Detective Knight testified that he arrived on the scene afterwards. The lead detective, Sergeant Stephen Grabowski, ordered him to "muster up" some witnesses. 10/18/2000 Trial Tr. at 701. Knight spoke with Thomas Davis. Mr. Davis was the driver of the other vehicle involved in the collision. Mr. Davis was on duty as a supervisor for Metro Loss Prevention driving a company SUV. Detective Knight took a statement from Mr. Davis. Appendix A-9. In addition, Knight took statements from Jimmy Green and Gloria Brown.[6] 10/17/2000 Trial Tr. at 410, Appendix A-11 and A-13.

Detective Knight testified that he had information to believe that Mr. Bryant had witnessed the car accident. Knight and Grabowski stopped by the residence of

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[6] Defense counsel admitted to having in his possession the statements of Thomas Davis, Rene Fleury, Green, and Brown prior to the start of the criminal trial. He also admitted that Green and Brown's statements directly impeach the testimony of Fournier and Sharp. 1/7/2005 Habeas Trial Tr. at 43-45, 56. According to Ms. Brown, she observed that one of the occupants of the Escort had "exited that vehicle and was lying on the ground." Then Mr. Green went to the other occupant, presumably Fournier, and assisted him out of the vehicle. Likewise, according to Mr. Green's written statement, he observed that the one male who had exited the vehicle was lying on the ground, while the second occupant, presumably Fournier, attempted to "stagger" out of the vehicle. Defense counsel failed to present Ms. Brown and failed to illicit testimony from Mr. Green to this effect during his lax cross-examination.

Janice Bryant, Mr. Bryant's mother on the afternoon of April 15, 1996. She had the day off from work and was performing regular house chores. 10/16/2000 Trial Tr. at 355. They did not have a warrant, but she let them in. Knight gained her trust because he knew Mrs. Bryant for at least fourteen years and Knight had helped her son get on the police basketball team. Id. at 351-352. Knight told her the police were investigating an early morning motor vehicle accident which her son may have witnessed.

The prosecution presented Mrs. Bryant. She testified that her son arrived home after the incident. His clothes did not contain any blood. 10/17/2000 Trial Tr. at 343. She customarily did his laundry so she washed the jeans he had worn. His shirt and sneakers remained unwashed. Id. at 348, 354. She did not see any blood on his clothes just some soil. She knew that her son had not washed those items because the washing machine was next to her bedroom and she did not hear the washer. Id. at 356. Knight had made Mrs. Bryant promise to call when her son was available which she promptly did. Knight testified that two days later he met with Mr. Bryant, collected the clothes Mr. Bryant wore at the time of the alleged incident, and brought him to the police station. 10/16/2000 Trial Tr. at 390. Mr. Bryant was very cooperative.[7]

Detective Knight testified to the oral statements which Mr. Bryant had made about the incident. Mr. Bryant purportedly said he was at a nearby Mobile station where he worked when he saw the Escort stop for some time. He approached the

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[7] Detective Knight had questioned Thomas Davis at length at the scene. Davis specifically told Knight that he had heard gunshots prior to the collision, that he observed a white Cadillac or Lincoln in pursuit of the Escort, that a "light skinned Hispanic" male exited the white vehicle holding what appeared to be a handgun, and that the light skinned Hispanic male moved to the direction of the Escort. 1/19/2005 Habeas Trial Tr. at 16-19. Detective Knight, however, refused to memorialize these findings into Mr. Davis' statement. Detective Knight duplicitously did not share any of the observations of Mr. Davis with Mr. Bryant. The jury remained unaware as well due to defense counsel's omissions.

vehicle and one of the occupants asked if he had any Readys, slang for crack cocaine. He did not have any, but a packet of white powder was exchanged. The driver sped off with Mr. Bryant holding on to the car. Id. at 388. Prior to the vehicle entering the intersection, he let go, tumbled, and injured his knee. By the time he got up, the collision had occurred as the Escort was at rest and the occupants of the Escort had already exited. One of the occupants was bleeding profusely. Mr. Bryant proceeded to the opposite direction to his mother's house on Garden Street. Id. 388. Knight did not memorialize these oral statements into writing.

The prosecution presented evidence that Mr. Bryant's clothes were tested by the state forensic lab. The sneakers which the prosecution alleged were used in the assault appeared unwashed.[8] Lead criminalist Kiti Settachatgul conducted the tests and she testified that neither contained any blood from either Fournier or the deceased. 10/19/2000 Trial Tr. at 879. Normal washing would not eliminate the presence of blood.

Arcady Katsnelson, the medical examiner who performed the autopsy, testified before Fournier did. 10/17/2000 Trial Tr. at 515. The Hartford Police provided him information that the deceased had been beat up and died as a result. He was not provided with any statements to suggest the deceased had been shot. Katsnelson was also provided with information suggesting that the deceased had been the driver. Katsnelson's physical examination of the deceased and subsequent opinion were premised on the deceased having had been the *driver, not* the *passenger*. Id. at 562-64.

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[8] Contrary to the petitioner's misrepresentation, there is no DNA evidence connecting the respondent to a homicide. His DNA was not found anywhere at the scene. Neither Fournier's nor the deceased's DNA was found on him. The petitioner mentions that an impression of a boot print was found on the deceased in support of its claim that the respondent beat the deceased. Mr. Bryant, however, wore sneakers.

The thrust of Katsnelson's testimony was to compare the injuries the deceased suffered with those a hypothetical driver would have been expected to suffer if the injuries were caused by the motor vehicle collision. Id. The passenger and driver would be expected to have two different patterns of broken ribs due to the difference in their positions within the vehicle and in the positions of each seat belt. The broken rib pattern of the deceased actually matched what would be expected if he had been the passenger. He concluded that since the deceased's broken rib pattern did not match those of the hypothetical driver's, the deceased's broken ribs were caused by an assault, not from a motor vehicle collision. Along those lines, he testified that the contusions to the right side of the deceased's face were indicative of an assault since the hypothetical driver in the collision would be expected to have similar contusions on the left side.

Katsnelson testified the cause of death was blunt trauma, but could not render an opinion to the specific instrument used if any and could not exclude if it were a gun, a tire iron, stick, etc. Id. at 558. He did not find evidence of gravel, sand, or dirt which one would expect to find if the deceased were assaulted in the manner presented by the state.[9] Katsnelson was never made aware that Fournier had lied to police when he told them the deceased drove the Escort. His testimony was premised on that lie.[10]

The prosecution presented Sergeant Grabowski who arrived on the scene at least two hours after the incident had occurred. The Escort had come to rest jammed

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[9] This is contradictory to the weather and roadway conditions on the day in question. It rained and the roadway was wet according to the Officer Perri. 10/16/2000 Trial Tr. at 270.

[10] The prosecution's order of witnesses was quite suspect and prejudicial to Mr. Bryant. The thrust of Katsnelson's cross-examination was that the deceased was the driver, so the line of cross-examination was limited. Only after he testified did the prosecution call Gary Fournier to testify. Only then was it established that the deceased was likely the passenger. Defense counsel did not investigate these circumstances properly and did not present them to the jury.

against a telephone pole with its driver's airbag deployed. He saw blood-like matter on the sidewalk feet from the front of the vehicle and on the front license plate. The scene the scene was well illuminated and well lit. 10/18/2000 Trial Tr. at 771.

Grabowski interviewed Fournier on several occasions. He found him to be uncooperative. Grabowski waited until February 20, 1997 to show Fournier a photo array. Id. at 731. The array contained eight pictures. Seven were presented to Fournier with black lettering. Only one, Mr. Bryant's, was presented with red lettering, heightening the suggestibility that Fournier would pick that photo. Id. 735. Identification was made despite the fact that on two prior occasions Fournier had stated that his lack of recollection would prevent him from making such identification.

Grabowski testified that he interrogated Mr. Bryant on November 17, 1997 seven months after Fournier's alleged identification. Mr. Bryant furnished a written statement. The statement was read to the jury by Grabowski. It indicates Mr. Bryant held onto the Escort for five seconds before the collision. One to two minutes elapsed before Mr. Bryant was able to gather himself after he fell from the Escort at great speed. By that time, the Escort had come to rest and one occupant was laying on the ground unconscious while the other occupant was sitting by the liquor store. Id. at 762.

It appears that after Mr. Bryant furnished his statement in November of 1997, the criminal investigation lay dormant until January 25, 2000 when Ewan Sharp was arrested for unrelated charges. Grabowski testified that he "debriefed" Sharp while Sharp was in custody at the Hartford Police Department. 10/19/2000 Trial Tr. at 803. The prosecution's presentation of evidence concluded with the prosecutor reading of Ewan Sharp's probable cause testimony to the jury in its entirety.

Defense counsel presented two witnesses for the defense. Sergeant Gordon Jones testified that there was a police substation equipped with outdoor cameras three blocks from where the incident occurred. 10/19/2000 Trial. Tr. at 1028. No requests were ever made to view the cameras or what the cameras recorded. Defense counsel then presented Mr. Bryant to testify. Defense counsel had decided Mr. Bryant should testify without consulting with or preparing him. Mr. Bryant testified that he worked until midnight at a Mobile station. He went home and returned back to the area about an hour later. He saw the Escort stop and "T-Time" approach the driver. He saw "T-Time" transact drugs with the driver. Some time passed. Mr. Bryant approached the driver's side of the vehicle and leaned against it. Id. at 1038. The driver suddenly pulled off. Mr. Bryant slid off and rolled across the street which was slick from the rain. It took time to gather himself. He did not witness the collision and did not witness what happened to the occupants other than one was already on the ground bleeding profusely by this time. Thomas Davis was still in the company SUV. Id. 1041.

Defense counsel rested following Mr. Bryant's testimony. Closing arguments ensued. The trial court charged the jury. The jury deliberated for three days. Mr. Bryant had been moved from Cheshire Correctional Institution to Hartford County Correctional Center. During jury deliberation, Ewan Sharp, who was also incarcerated there, slipped Mr. Bryant a handwritten note. Appendix A-15. The note is an admission by Sharp that he had fabricated his probable cause testimony and that he had assisted the state to "frame" Mr. Bryant. Mr. Bryant forwarded the note to defense counsel. Defense counsel promised to investigate the note, but did not. 1/7/2005 Habeas Trial Tr. at 90. The jury was never made aware of it.

On October 27, 2000, the jury rendered its verdict. Mr. Bryant was convicted of the lesser included offense of manslaughter in the first degree. On January 11, 2001, the trial court sentenced Mr. Bryant to nineteen years.

C. Mr. Bryant's Habeas Trial

The far fetched scenario posed by Sharp and Fournier was completely discredited by the evidence presented at the habeas trial. Defense counsel failed to present available evidence to the jury which would have led to reasonable doubt. Four eyewitnesses testified at the habeas trial that should have testified at the criminal proceeding but did not: Ms. Rene Fleury, Mr. Thomas Davis, Ms. Melissa Young-Duncan, and Mr. John Gartley. In addition, defense counsel should have presented testimony from two other available witnesses: Gloria Brown and Jimmy Green. Expert testimony presented at the habeas trial supported these claims of ineffectiveness.

Rene Fleury was engaged to Fournier. Hours after the collision in April of 1996, Fournier escaped from the hospital and fled to her apartment. She testified that she asked him what had happened. He mumbled to her that there had been an incident "with three Hispanic males and a gun." Mr. Bryant is a dark skinned black man of African-American descent.

Defense counsel never contacted her prior to the criminal trial. Ms. Fleury worked as an assistant with a civil law firm and the respondent did not impeach her credibility at the habeas trial. She furnished her statement to the Hartford Police Department the same day Fournier made the excited utterance and admission to her. Defense counsel admitted that he did nothing to investigate Ms. Fleury or the possibility of another party's involvement. 1/7/2005 Habeas Trial Tr. at 61.

Ms. Rene Fleury's available testimony at the criminal trial would have tied in with the available testimony of Thomas Davis who was the occupant of the other vehicle at the time of the collision. Davis was a veteran of the United States Marine Corps where he served as a gunnery and ammunition specialist. 1/19/2005 Habeas Trial Tr. at 14. His training with regards to guns was "very extensive." Id. at 21.

At the night in question, he was employed as an armed security supervisor for Metro Loss Prevention Services. He was driving a company SUV. As he approached the intersection, he heard the sound of a small caliber weapon with the distinct familiar pop of a .22 caliber handgun being fired. Id. at 16. Immediately thereafter, he saw the vehicle containing the deceased and Fournier, a blue Ford Escort, traveling the wrong way on a one way street and approaching his vehicle at a rate of speed of between thirty-five and forty miles an hour. Id. at 16-17. The driver of the Escort was slumped over the wheel. Davis testified in hot pursuit of the Escort was a white Cadillac or Lincoln traveling in the same direction as the Escort. Id. at 18. The Escort collided with the SUV at high speed. He observed the white Cadillac or Lincoln stop and he saw a light skinned Hispanic man wielding what appeared to be a small caliber handgun. Id. at 19. The light skinned Hispanic male exited from the rear passenger side of the white car, presumably the third occupant of the vehicle.

The light skinned Hispanic male approached Mr. Davis. Davis was able to "get a good look at him." Id. at 20. Davis drew his security issued firearm. At that point, the light skinned Hispanic male looked at him, turned around, and went up to the corner in the direction of the Escort. The light skinned Hispanic male *ran towards the Escort and its occupants*. Id. at 54. Davis maintained a clear line of vision at all times

towards the Escort and at no time did he see anyone drag, hit, or kick either occupant of the Escort. Id. at 22-23, 27.

The Hartford Police Department questioned Mr. Davis on scene. He relayed these observations to Detective Knight. But Knight both refused to memorialize those items into the statement and dissuaded Mr. Davis from discussing those facts any further. Id. at 30. Knight badgered Davis. Knight instructed Davis to limit his observations to the motor vehicle collision only. Knight expressed to Davis that he did not want Davis to memorialize the exculpatory information into his written statement.[11] The investigating officers would later tell Mr. Davis that a tire iron was found on Irving Street with part of the deceased's head attached to it.[12] Id. at 35.

Mr. Davis was contacted by the prosecutor's office prior to the criminal trial. Id. at 34. He conveyed all of the above mentioned information again. According to defense counsel, the prosecution never disclosed this information whose nature was exculpatory and should have been disclosed under Brady vs. Maryland. 373 U.S. 83 (1963). Defense counsel testified that he relied on representations made by the prosecutor's office to the effect that Mr. Davis could not be located. 1/19/2005 Habeas Trial Tr. at 131. He, therefore, did not locate and did not investigate Mr. Davis.

Moments after the high speed collision, Mr. Davis radioed from a communication device in the SUV for assistance. Jimmy Green and Gloria Brown were employed as security personnel under his supervision on the night of April 14, 1996 at a nearby

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[11] Knight testified at Mr. Bryant's criminal trial that he took a statement from Mr. Bryant a few days after the incident. Defense counsel failed to impeach Knight on why Knight did not share any of the information which Mr. Davis had provided him with Mr. Bryant. Defense counsel failed to impeach other members of the Hartford Police Department with the observations of Mr. Davis.

[12] This contradicts the prosecution's theory which it presented through Sharp and Fournier. Neither Sharp nor Fournier testified that an object or instrument was used during the alleged assault.

location three hundred feet away. 1/19/2005 Habeas Trial Tr. at 44. Green testified at the criminal trial that he heard a bang. 10/16/2000 Trial Tr. at 292-293. Later, he heard a second, louder and different sounding bang. Id. Fifteen to twenty seconds later, he received a call over the company radio. Id. at 293.

Green covered the block's distance within seconds. 1/19/2005 Habeas Trial Tr. at 44. He immediately ran to Fournier who was exiting the vehicle. He assisted him toward the stoop of a liquor store. Green did not see Mr. Bryant drag the deceased out of the vehicle and did not see Mr. Bryant assault the deceased or Fournier. His testimony at the criminal trial is consistent with the pattern of gunfire which Mr. Davis testified to at the habeas trial. A proper investigation by defense counsel would have revealed that the source of the first "bang" was gunfire from a .22 caliber handgun and the second was the vehicle collision. The jury was never made aware.

Gloria Brown arrived on scene with Green. She made her way to the SUV while Green assisted the occupants of the Escort. One of the occupants had exited the vehicle and was lying on the ground bleeding profusely from the head. She remained on scene as the EMT and paramedic arrived. Both Green and Brown furnished statements to the police which defense counsel had in his possession prior to trial.

Ms. Brown's statement implies that she did not see Mr. Bryant drag the occupants out of the Escort and beat them. Appendix A-13. Her statement critically contradicts the state's version of facts presented by Fournier and Sharp. Defense counsel, however, failed to contact and investigates Ms. Brown and Mr. Green prior to trial. Defense counsel did not illicit from him available evidence beneficial to the defense. Ms. Brown never testified.

Neither did defense counsel present Fleury and Davis to the jury to establish the involvement of at least one, possibly three, light skinned Hispanic males with guns. Similarly, he never presented Melissa Young-Duncan, an EMT, and John Gartley, a paramedic, to establish that the deceased was shot by one of the light skinned Hispanic males and that the cause of death was alternative to that which the prosecution posed to the jury. Both were paired up at the night of the alleged incident in April of 1996. They were stationed at St. Francis Hospital about five blocks from the intersection of Albany Avenue and Irving Street. They responded to the scene moments after dispatch. There was not much traffic. 1/7/2005 Habeas Trial Tr. at 5, 23.

John Gartley testified that he immediately began to evaluate the deceased and he "was touching him throughout." Id. 28. Several factors led him to observe a gunshot wound to the left temple. First, the size of the entrance wound—it was "small." Id. Second, its shape was a "circular-type" of hole about the "roundness of a pencil" consistent with a .22 caliber weapon. Id. Third, the area of the left temple directly around the entrance gunshot wound had "black residue" which was consistent with gun powder. Id. 28-29. Fourth, there was tissue protruding from back out of the hole "which was normal for a gunshot wound of that type." Id. at 28. Fifth, after he examined the scalp, he found a second wound "consistent with an exit wound." Id. 28.

The existence of an exit wound could explain why the medical examiner's report failed to mention a gunshot wound if the bullet exited the deceased's body. Gartley's forensic training by the police department to identify gunshot wounds was extensive. In addition, he had responded to "easily over a thousand" motor vehicle accidents and "anywhere between a hundred and two hundred" gunshot wound cases in his twenty

three years of experience. Id at 27.

Melissa Young-Duncan's experience was also impressive.[13] She had responded to over a thousand motor vehicle accidents and to over fifty gunshot shootings. 1/7/2005 Habeas Trial Tr. at 8. In addition, she had undergone monthly extensive forensic and police training which specifically included how to identify gunshot wounds. Young-Duncan first responded to the Escort. The driver's door could not be opened because it was blocked by a telephone pole. Id. at 7. She examined the deceased for at least twenty minutes to determine the nature of his injury. Id. at 20. The area was well lit. A gunshot wound was clearly evident to the deceased's left temple. There was the familiar black residue of gun powder "perfectly around the entrance shot." Id. 9-10. The shape of the wound was a "perfect" fit of a small caliber bullet and the size of the entrance wound was "a perfectly round hole." Id. Young-Duncan testified that several detectives and sergeants from the Hartford Police Department questioned her. She and Gartley furnished written statements to the police which defense counsel had in his possession prior to trial reflect the deceased had a gunshot wound to the left temple area. Appendix A-6, A-7.

After she furnished her statement, she transported the deceased to St. Francis Hospital where she remained for some time. She reported and showed the gunshot wound to several members of the police including to Sergeant Leftwich who said: "Yeah, that does look like to be a gunshot wound." Id. at 12. The prosecution did not disclose this information, whose nature was exculpatory under Brady, to the defense.

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[13] The petitioner misrepresents Gartley's and Young-Duncan's training. Both had considerable experience, education, and training in the area gunshot wound identification.

REASONS FOR DENYING WRIT

The petitioner advances flawed arguments. It argues that the Connecticut Supreme Court's decision conflicts with Strickland v. Washington, 466 U.S. 668 (1984) on the issue of "deference" to defense counsel's performance. The petitioner plucks three cases decided in 1997, 2000, and 2008 from other states to advance an argument that the time is ripe for this Court to re-examine Strickland and impose a draconian standard whereby every error and omission made by defense counsel should be protected under the guise of "deference." The petitioner's arguments have no merit. The Connecticut Supreme Court's decision does not conflict with Strickland and holdings of this Court, but is entirely consistent with them. The petitioner has not advanced any support to bolster its unfounded claim that the necessity exists for this Court to re-examine Strickland and adopt the standard proposed by the petitioner.

The Connecticut Supreme Court's decision in Mr. Bryant's matter is well aligned with the United States Constitution, decisions of this Court, and federal case law. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him...and to have assistance of counsel for his defense." The Sixth Amendment rights of confrontation and right to counsel are made applicable to the states through the due process of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965) and Gideon v. Wainwright, 372 U.S. 335 (1963).

The right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 (1970). The assessment of whether or not counsel was effective is two prong. Strickland v. Washington, 466 U.S. 668, 687 (1984). First, the

habeas petitioner must show that counsel's performance was deficient. Id. "This requires a showing that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." Id. Second, the habeas petitioner must show that counsel's errors were so serious as to deprive the petitioner of a fair trial, "a trial whose result is reliable." Id.

The habeas petitioner must show that counsel's representation fell below an objective standard of reasonableness. The proper measure of attorney performance "remains simply reasonableness under the prevailing professional norms." Id. at 688. The burden of proof a petitioner has with regards to the performance prong is preponderance of the evidence. Id. 694; see Johnson v. Zerbst, 304 U.S. 458, 469 (1938). The burden as it regards to the prejudice prong is lower and he need "only demonstrate a reasonable probability that he was incompetent, sufficient to undermine confidence in the outcome....[t]his is a lower burden than preponderance of the evidence." Bouchillon v. Collins, 907 F.2d 589, 595 (5th Cir. 1990).

"Habeas corpus is the ultimate inquiry into the fundamental fairness of a criminal proceeding." Summerville v. Warden, 229 Conn. 397, 421 (1994). It is designed "to remedy fundamental miscarriages of justices." Id. at 422. Historically, the "writ's function has been to provide a prompt and efficious remedy for whatever society deems to be intolerable restraints." Fay v. Noia, 372 U.S. 391, 401-402 (1963); Harris v. Nelson, 394 U.S. 286, 291 (1969). Its function is also flexible. It is "not now and never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." Jones v. Cunningham, 371 U.S. 236,243 (1963).

In Dunkley v. Commissioner of Correction, 222 Conn. 444 (1992), the Connecticut Supreme Court reviewed the basic principles that now govern habeas corpus petitions:

> "The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate 'fundamental fairness'....To mount a successful collateral attack on his conviction, a prisoner must demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal....In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction."

Id., 460-61; Summerville v. Warden, supra, 419 (quoting same); see Gaines v. Manson, 194 Conn. 510, 516 (1984) ("the writ of habeas corpus 'holds an honored position in our jurisprudence...[as] a bulwark against convictions that violate fundamental fairness.'"); Safford v. Warden, 223 Conn. 180, 190 (1992) (same); Lozada v. Warden, 223 Conn. 834, 840 (1992) (the writ of habeas corpus can even remedy statutory violations that implicate "fundamental fairness"). In the present matter, Mr. Bryant has sought, through his writ of habeas corpus, to remedy an "extreme malfunction" that occurred in our criminal justice system. Jackson v. Virginia, 443 U.S. 307, 332 (1979) (Stevens, J., concurring in the judgment); Brecht v. Abrahamson, 507 U.S. 619, 634 (1993).

I. THE FACTUAL SCENARIO PRESENTED BY THE PETITIONER ACTUALLY SUPPORTS THE REASONABLENESS OF THE FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*. THIS FACTUAL SCENARIO REVEALS THAT THE QUALITY OF THE EVIDENCE PRESENTED BY THE PROSECUTION TO CONVICT THE RESPONDENT WAS WEAK AND EASILY IMPEACHABLE.

The petitioner's writ is essentially based on its factual interpretation of the evidence presented by the prosecution at the criminal proceeding, not the scant evidence it presented at the habeas proceeding. The petitioner's argument is strictly

fact based and at its core is built on what it posits this Court should believe are facts. The petitioner avoids a meaningful legal analysis to bolster its unfounded claim that the Connecticut Supreme Court failed to afford proper deference to defense counsel's failures. If the factual scenario asserted by petitioner fails, then so must its argument.

A. The Fact Based Argument Presented by the Petitioner Is Flawed

The petitioner acknowledges on page 4 of its writ that Mr. Bryant's conviction hinged on the probable cause testimony of Ewan Sharp and the trial testimony of Gary Fournier. Upon closer examination, the evidence the petitioner espouses to support the respondent's conviction is fundamentally flawed. This Court should therefore not be swayed by the petitioner's unfounded claims.

Sharp refused to testify when the prosecution later called him as a witness during the jury trial. He and his attorney intimated that his probable cause testimony was perjured. 10/17/2000 Trial Tr. at 459. He refused to testify despite an offer of absolute immunity and a six month sentence of contempt of court.[14] The transcript of Sharp's probable cause testimony was read by a prosecutor to the jury in its entirety. In it, Sharp claimed that the deceased and someone else, Fournier, were the occupants of an Escort when a drug transaction occurred. The driver sped off while Mr. Bryant held onto the car. The Escort was involved in a high speed collision with a heavy SUV. Sharp claimed that Mr. Bryant, in a period of "five seconds," snatched the driver who

[14] The petitioner fails to mention several material facts which the jury remained unaware of due to defense counsel's omissions which go to the heart of the quality of Sharp's testimony. Sharp admitted in the absence of the jury that his probable cause testimony implicating the respondent was perjured. He confirmed the detritus nature of this testimony through a letter of recantation which defense counsel refused to investigate. The prosecution furnished Sharp with a benefit to testify in a beneficial manner at the probable cause hearing. Sharp had amassed a conviction record of at least four felonies by the time of his arrest of armed robbery in 1999, yet the prosecution furnished him with the very favorable disposition of lowering his armed robbery charges to misdemeanor larceny with a period of no jail time.

was the deceased. Sharp testified the passenger, Gary Fournier, exited on his own volition and was never assaulted. His testimony was based on information which the Hartford police provided to him four years after the incident to the effect that the deceased was the driver. It is not a coincidence then that Sharp's testimony matched with the information Fournier had provided the Hartford police up to that point.

Fournier testified that he was living with his fiancé, Rene Fleury, who was at work an unaware of his indiscretions. 10/18/2000 Trial T. at 605. On April 13, 1996, he and the deceased were in the midst of a cocaine binge when, around midnight, they needed more cocaine. Fournier testified that he drove Fleury's car to Albany Avenue in Hartford where he had bought drugs before. The deceased rode as the passenger contrary to the information which Fournier had provided to the police on numerous prior occasions.[15] He recognized a dealer he knew as "T-Time" and initiated a drug transaction. Fournier refused to pay so he sped off, ran a stop sign, and then a "Jeep Cherokee hit [him] on the driver's door." Id. at 653-655. The Escort spun, then hit a telephone pole and came to rest with the driver's door lodged against the pole.

After the collision, Fournier claimed that respondent ran towards the Escort and dragged him out of the car from the driver's side where the respondent proceeded to beat him. Fournier then turned his back to the deceased and stumbled unassisted a distance of thirty feet to the stoop of a liquor store where he sat down. Id. at 618, 676.

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[15] Fournier originally told the police that he and the deceased were not assaulted. Up until the time of trial, Fournier maintained that the deceased was the driver and that he was the passenger. Fournier acknowledged to lying to the police and to lying during his trial testimony on numerous occasions. Id. at 647, 648, 649, 650, 653, 655, 656, 657, 659, 664, 665. The petitioner builds its argument on the veracity and credibility of Fournier. On page 15 of its petition it wants the Court to disbelieve and disregard the statement which Fournier made to his fiancé, Rene Fleury, about "three Spanish guys with a gun." The police had not yet contacted Ms. Fleury. The circumstances surrounding this last statement render it reliable. It is the only statement he uttered with nothing to gain.

> "Fournier testified that after kicking him for about fifteen seconds, the respondent went back to the car and dragged Jones out. From that location, Fournier watched the respondent beat and kick Jones at the front of the car." Petitioner's petition at page 6.

While sitting on the steps, he claimed to have witnessed the petitioner run back to the Escort, lift the passenger through the passenger side window, and beat him.[16] Asked where his location was during the assault of the deceased, Fournier responded: "*I was sitting if thirty yards away on a step.*" *Emphasis* added, 10/18/2000 Trial T. at 618.

1. **The petitioner neglects the essential fact that Fournier necessarily had company on the stoop who, unlike Fournier, did not witness the respondent assault the deceased.**

Fournier must have had company while he sat on the stoop watching the assault on the deceased in order for the factual scenario presented by the respondent to fit. At least three other people accompanied Fournier on the steps: "T-Time," Jimmy Green, and Gloria Brown.[17] "T-Time" testified that he remained on scene and witnessed the collision which almost pinned the petitioner between both vehicles. "T-Time" saw Fournier stumble out of the Escort and followed him to the stoop while the passenger was "laying there face down, wasn't no motion, he wasn't moving or anything." 10/16/2000 Trial Tr. at 319. "T-Time" saw someone assisting Fournier "walking him

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[16] This was not possible, as according to police testimony and evidence, the passenger side window was rolled up and closed. 10/19/2000 Trial T. at 811, 853.

[17] The petitioner makes several material misrepresentations regarding the testimony of "T-Time." For example on pages 7-8 of its petition, the petitioner avers that T-Time left the scene for a few minutes after witnessing the vehicle collision, the implication being he could not have witnessed the assault. T-Time actually testified that he remained on scene and did not "jet" from the scene until "[a]bout ten minutes went by." 10/16/2000 Trial Tr. at 322. Furthermore, "T-Time" testified Mr. Bryant hobbled in the opposite direction of where the Ford Escort and its occupants had come to rest.

over to sit down on the steps of Blanche's liquor store]."[18] Id. at 339. At the stoop "T-Time" confronted Fournier:

> "Yeah, I went over there and before I jetted or left the scene, at the time I told him--I said, You know, why did he--you know, why did he do what he did? You know why did he try to leave--drive off or run off with whatever. You know why did he do that 'cause look what happened. He done got his friend killed or dead or hurt or whatever. So I told him that and from that point there I--then I left." Id. at 320.

Jimmy Green, a security guard, testified that upon his arrival to the scene he made his way to the Escort. He saw the deceased lying on the ground and a second man, Fournier, "staggering" "two or three feet away from the vehicle." Id. at 286-8. Green, along with his colleague Gloria Brown, assisted Fournier to the stoop.

> "A. At that point, I stopped a gentleman that was staggering. And we stopped him and had him sit down.
> Q. Again, when you say 'we', are you referring to you and Ms. Brown?
> A. Ms. Brown, yes...
> Q. Do you recall where you sat him down?
> A. We stopped him--we sat him down, me and Ms. Brown, in front of I believe it was a liquor store...we waited for the police and the paramedics to show up." Id. at 288.

Green testified he did not see Mr. Bryant at the scene and did not see anyone running from the scene. Id. at 295-296. "T-Time" did not see Mr. Bryant at that time either.

2. The time-frame of the sequence of events renders the petitioner's factual scenario implausible.

The petitioner's argument is made weaker upon close inspection of the time frame and other facts, which the petitioner does not dispute, in which the respondent allegedly assaulted the deceased in the manner proscribed. The rate of speed at which

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[18] "T-Time" confirms that Fournier "was being brought over" to "the front of Blanche's, which is a liquor store" and assisted to the stoop. Id. at 319, 339. Jimmy Green confirmed that he and Gloria Brown were the persons who assisted Fournier to the stoop.

the Escort was traveling at the time the respondent disengaged was "between thirty-five and forty-five miles an hour." 1/19/05 Habeas Trial Tr. at 19. Thomas Davis dispatched for assistance immediately after the Escort collided with the company SUV he was driving. Jimmy Green was located approximately "a hundred and fifty feet away from" the scene. Id. at 41. He arrived on scene within "forty seconds" of dispatch and someone responded to the SUV within "a minute, minute and a half" of dispatch.

Therefore, the factual scenario recited by the petitioner is preposterous. It would have been humanly impossible for the respondent to have gathered himself after sliding off the vehicle at such a high rate of speed, run to the driver's side of the Escort, snatch Fournier out from the driver's door which was lodged against a utility pole, proceed to assault Fournier, then run around the Escort, snatch the deceased out of the shut passenger window, and beat him severely enough to kill him all within the span of forty seconds. The jury was never presented with the impossibility of this time frame due to defense counsel's ineffectiveness.

The petitioner continues to assert unfounded and rejected facts to obtain further judicial review. The trial record simply does not support its arguments.

II. THE EXCULPATORY EVIDENCE WHICH DEFENSE COUNSEL FAILED TO UNEARTH AND THEN PRESENT WOULD HAVE IMPEACHED THE PROSECUTION'S CASE, WOULD HAVE ESTABLISED A SUCCESSFUL DEFENSE OF THIRD PARTY CULPABILITY, AND WOULD HAVE BOLSTERED THE RESPONSENT'S DEFENSE THAT HE DID NOT COMMIT THE OFFENSE AS CHARGED. THE PETITIONER'S FLAWED CLAIMS MUST FAIL UNDER A *STRICKLAND* ANALYSIS.

The Connecticut Supreme Court upheld that Mr. Bryant's conviction and sentence of nineteen years were defective under the Sixth Amendment of the United States Constitution and under the Constitution of Connecticut in that his defense

counsel failed to investigate, failed to present available evidence which contradicted the prosecution's case, and failed to present a viable third-party culpability defense. Defense counsel failed to present Fleury, Davis, Young-Duncan, and Gartley to the jury to establish the involvement of at least one, possibly three, light skinned Hispanic males in the incident and that Mr. Bryant was not responsible for the death.

The Connecticut Supreme Court aptly noted the jury at Mr. Bryant's criminal trial was presented with a credibility contest between the prosecution's version of events as presented by the prosecution's unsavory characters and the petitioner's version of events.[19] At the crux of this contest was the issue of reasonable doubt. The jury deliberated for three days and acquitted the petitioner of murder. The jury was saddled with doubt which the petitioner has never denied.

In circumstances that largely involve a credibility contest, "the testimony of neutral, disinterested witnesses is exceedingly important." Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995). Defense counsel for Mr. Bryant did no investigation whatsoever. The petitioner's claim that the Connecticut Supreme Court did not show appropriate deference to defense counsel's failure to investigate is without merit. The United States Supreme Court held in Wiggins v. Smith, that in assessing the reasonableness of an attorney's investigation, a court "must consider not only the quantum of evidence already known to counsel, but whether the known evidence would

[19] Had defense counsel been diligent in his investigation and presentation of the respondent's case, he should not have made the decision to present the unprepared respondent to testify. Therefore, the petitioner's reliance on Mr. Bryant's testimony at the criminal proceeding to support its contention that the four missing witnesses should not have been presented to the jury because their testimony would have prejudiced the defense is unfounded. The petitioner's obsessive use of the respondent's criminal trial testimony which it materially misrepresents to support its position is to borrow an adjective repeatedly used by the petitioner to disparage the undersigned's position, "absurd."

lead to a reasonable attorney to investigate further." 539 U.S. 510, 527 (2003).

The petitioner's denial of the impact of their testimony upon the jury at Mr. Bryant's criminal trial is short-sighted and contrary to the findings of facts. Their testimony cast doubt on the theory presented by the prosecution that the respondent was responsible for the death. Their testimony impeaches the state's evidence by creating the likelihood that someone other than the respondent committed the offenses. "A defendant may give evidence concerning a third person's involvement with the crime as long as there is some evidence which directly connects the third party with the crime." Simeon v. Stoughton, 184 Conn. 547, 555 (1981). See State v. Giguere, 184 Conn. 400, 405 (1981); State v. Marshall, 166 Conn. 593, 601 (1974); and State v. Arroyo, 284 Conn. 597 (2007). The respondent presented overwhelming evidence at the habeas trial which established a viable, successful third party culpability defense.

Because the habeas court is in the best position to weigh the evidence, including the credibility of the witnesses presented before it, the province of the fact finding of the habeas court should not be disturbed by a reviewing court. Siano v. Warden, 31 Conn. App. 94 (1993). Contrary to what the petitioner ploys, the function of a reviewing court "is not to examine the record to see if the trier of fact could have reached a contrary conclusion." Id. at 95. What the petitioner is asking this Court to do is to reopen the factual findings which were made by the lower court and then substitute these findings with the factual assertions supplied by the petitioner.[20] The

[20] The court in Harris v. Reed, 894 F.2d 871, 877 (7th Cir. 1990), illustrates the folly of the petitioner's ploy: "The temptation to read the one-dimensional record on appeal and unwittingly take up the role of the 'Monday morning quarterback' is ever present. In the context of ineffective assistance claims, appellate judges—who are often drawn from the trial bar and who are generally expected to be

petitioner wants this Court to engage in speculation. The basis of the petitioner's ploy seems to be that the autopsy report did not mention a gunshot wound.

The petitioner's reliance on the autopsy is misguided and is based on a skewed premise that this medical examiner is infallible. The medical examiner was never made aware of the findings of Gartley, the paramedic, and Young-Duncan, the EMT. Katsnelson was told only that this was a beating case. The autopsy report does indicate that the deceased's skull was severely fractured.[21] It is reasonable that the force of the impact of the collision, coupled with a gunshot wound to the head, and emergency medical treatment at the trauma center could have masked the existence of the gunshot wound to the head by the time of the post-mortem examination. The examination was done a substantial amount of time after those events.

Defense counsel never challenged the cause of death offered by the prosecution. The excuse supplied by the petitioner for defense counsel's omission was that the medical examiner's report lacked mention of a gunshot wound.[22] Defense counsel, however, should have had several concerns about the validity of the autopsy report which should have led him to dig deeper. The opinion of the same medical examiner, Katsnelson, was found defective in another murder case. Summerville v. Warden, 29 Conn. App. 162 (1992). His report fails to mention any "defensive wounds" on the

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omnipresent in all other respects—must quell the tendency to call the plays they think should have been called."

[21] The petitioner misrepresents the deceased's injuries, Katsnelson's findings, and how he reached these findings.

[22] The petitioner disregards the credible evidence available to the habeas court which supports the fact that a gun was involved in the incident. Thomas Davis heard gunfire consistent with a .22 caliber weapon. Melissa Young-Duncan and John Gartley observed gunpowder residue, an entrance wound, and an exit wound all consistent with a .22 caliber gunshot wound. Several members of the Hartford Police observed the gunshot wound in Young-Duncan's presence including Sergeant Leftwich who said: "Yeah, that does look like to be a gunshot wound." 1/7/2005 Habeas Trial Tr. at 12. Apparently, the petitioner will only be satisfied with the proverbial so-called "smoking gun."

hands or arms of the deceased which would have been expected if the deceased were assaulted in the manner the prosecution alleged. Defense counsel had in his possession Gartley's and Young-Duncan's statements in which they clearly observe a gunshot wound. Furthermore, he was on notice through Katsnelson's probable cause testimony that Katsnelson's veered from the reasonable standard because his assessment of the deceased injuries was done without examining the Escort, without reconstructing the accident, and without visiting the scene. His normal practice was to do all three. 10/17/2000 Trial Tr. at 515.

These concerns should have alerted defense counsel to consult with an expert to dispute the medical examiner's report instead of relying on medical evidence provided by the state. Or at the least he should have investigated further. See Lindstadt v. Keane, 239 F.3d 191,205 (2nd Cir. 2001). Defense counsel decided not to consult an expert for reasons which had nothing to do with serving Mr. Bryant's interests. Therefore, the considerations that animated defense counsel's decision not to call a medical expert cannot be described as truly "strategic." Pavel v. Hollins, 261 F.3d 210, 223 (2nd Cir. 2001). Had defense counsel mounted on attack on Katsnelson's cause of death, it would have naturally called into question whether Mr. Bryant was responsible for the death of the deceased since there was no evidence presented by the state connecting him to a gun or to a blunt object. Katsnelson's testimony was already suspect because he admittedly veered from the standard of medical examiner conduct.

The Connecticut Supreme Court has fashioned the fundamental rule to guide a reviewing court's analysis of a habeas court's decision. The habeas court "is afforded broad discretion in making its factual findings, and those findings will not be disturbed

unless they are clearly erroneous." Taylor v. Commissioner, 284 Conn. 433, 448 (2007); see Copas v. Commissioner, 234 Conn. 139, 152 (1995). Historical facts constitute a recital of external events and the credibility of their narrators.

The Connecticut Supreme Court prudently found that defense counsel did not offer any reasonable, plausible explanation as to why he failed to investigate, speak with, or present these witnesses to the jury. The petitioner disturbs these finding of facts to provide an excuse for defense counsel in hindsight: trial strategy. The petitioner plucks three cases from other states to bolster its bold assertion that this Court should shield every failure, error, and omission of defense counsels throughout the nation with this guise. A defendant would never be able to overcome this hurdle.

The cloak which the petitioner proposes is contrary to law. While there is normally a presumption that counsel was effective, there must be evidence that counsel's strategy was "sound." Santiago v. Commissioner, 90 Conn. App. 420, 425 (2005). Otherwise, a defendant would have an insurmountable obstacle. A court could never find an attorney ineffective if the petitioner's interpretation of Strickland were adopted. The rights and protection afforded by the Sixth Amendment would be stripped. "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." Kimmelman v. Morrison, 477 US 365, 386 (1986).

Defense counsel testified that his strategy during trial is not to present defense witnesses. Instead, defense counsel prefers to "rely solely" on his cross-examination. Defense counsel's failure to conduct an independent investigation, coupled with his inappropriately lax reliance on the prosecution, prevented him from reasonably

appreciating the evidence available to him. These omissions were not "tactical" because they were not based on a sound investigation. These dangerous follies would be endorsed and adopted throughout the nation if this Court grants writ.

The absence from the criminal trial of Thomas Davis, Fleury, Gartley and Young-Duncan contradict what defense counsel offered as his best trial tactic, namely to show that the prosecution's witnesses were "dirty" through cross-examination. 1/7/2005 Habeas Trial Tr. at 109, 130. Defense counsel admitted that a better method "to show that a witness is dirty is by asking another witness who is clean to testify in the defense's case." Id. at 132. He did not challenge Sharp's and Fournier's credibility.[23]

The United States Supreme Court has explained the relationship between an attorney's pre-trial investigation and the choices that he makes with regard to matters of trial strategy: "Strategic choices ***made after thorough investigation of law and facts relevant to plausible options*** are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations of the investigation." *Emphasis added*, Strickland, at 691. Here, defense counsel did not contact Thomas Davis, Renee Fleury, John Gartley and Melissa Young Duncan. Had he done so, he would have uncovered much exculpatory

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[23] The right to effective assistance of counsel includes post verdict matters. Valeriano v. Bronson, 209 Conn. 75 (1988); Consiglio v. Warden, 153 Conn. 673 (1966). Ewan Sharp and Mr. Bryant were housed at the same facility during jury deliberations when Sharp slipped Mr. Bryant a letter. Appendix A-15. The note is an admission by Sharp that his testimony was perjured and it hints at a vendetta by the Hartford Police to convict Mr. Bryant. Defense counsel, however, failed to investigate the contents of the note and to file a post-verdict motion for a new trial. The probability of success of such a motion is heightened by Sharp's earlier acknowledgements of perjury. "Where the prosecution employs perjured testimony...'the conviction must be set aside if there is any reasonable likelihood the false testimony could have affected the judgment of the jury.'" United States v. Agurs, 427 U.S. 97,104 (1976).

evidence.[24] Defense counsel relied on the statement of the state's attorney that Thomas Davis could not be located. 1/7/2005 Habeas Trial Tr. at 131. Mr. Davis was easily located as, at the relevant time, he was still employed with Metro Loss Prevention, had a business in his name, and had at least three vehicles registered in his name. 1/19/2005 Habeas Trial Tr. at 36. Defense counsel's failure to investigate was therefore based on "inattention, not reasoned strategic judgment." Wiggins v. Smith, 539 U.S. 510, 526 (2003).

In Code v. Montgomery, 799 F 2d. 1481 (11th Cir. 1986), the court concluded that the failure to interview more than one witness in support of the defendant's alibi witness constituted ineffective assistance of counsel. A defense attorney has a duty to do an independent analysis of the case and not to rely on the state. Simeon v. Stoughton, 184 Conn. 547 (1981), Harris v. Reed, 894 F 2d 871 (7th Cir. 1990).

This duty extends to calling witnesses which contradict the state's evidence, not merely to rely on the cross-examination of the state's witnesses. This failure is ordinarily enough to sustain a habeas claim. An attorney's failure to present available exculpatory evidence "is ordinarily deficient." Pavel v. Hollins, 261 F.3d 210, 220 (2nd Cir. 2001). The disastrous consequences and prejudice to the defendant when the defense counsel breaches these most obvious duties: "eyewitness evidence is precisely the sort of evidence" that "refutes" the state's case and leads to doubt in the minds of

[24] The petitioner did not controvert these facts at the habeas trial and avoids a meaningful discussion of their existence and gravity, but now in hindsight seeks to disturb these material facts. The petitioner's writ has numerous factual inaccuracies. For example, Thomas Davis testified he maintained a clear unobstructed view of the Escort and its occupants, and that the light skinned Hispanic male ***ran towards the Escort and its occupants***. 1/19/2005 Habeas Trial Tr. at 54. The petitioner misrepresents that Davis' view was obstructed and that the Hispanic male retreated to the white vehicle then left the scene.

jurors. Bigelow v. Williams, 367 F.3rd 562, 572 (6th Cir. 2004). Such evidence leads to reasonable doubt and to acquittal. The jury already appeared to have doubt as it deliberated for three days and acquitted Mr. Bryant of murder.

Defense counsel testified that in his mind the case hinged on the identification of Mr. Bryant and on impeaching the identifications made by Sharp and Fournier. 1/7/2005 Habeas Trail Tr. at 109, 112. The testimony of Thomas Davis and Renee Fleury unequivocally cast doubt on the identifications made by Sharp and Fournier. Mr. Davis and Ms. Fleury support the involvement of a "light skinned" Hispanic male. Mr. Bryant is a dark skinned African-American. If the jury was willing to credit the testimony of Mr. Davis and Ms. Fleury, it would have further discredited the testimony of Sharp and Fournier, augmented the impeachment of the police, and provided the jury with a viable basis for clinging to the presumption that Mr. Bryant was innocent. They were unbiased witnesses whose account largely corroborated each others'.

Defense counsel could have used the testimony of Melissa Young-Duncan and John Gartley to impeach Katsnelson and to bolster the defense. Both examined the deceased thoroughly to find an entrance and exit wound consistent with a .22 caliber handgun, both found evidence of stippling around the entrance wound, and both had extensive experience and training. The medical examiner was never made aware of the observations of Gartley and Young-Duncan because representatives of the prosecution summarily informed him this was a beating case which would explain why the examiner rendered his opinion without following proper protocol.

Defense counsel testified that he did not want to present John Gartley and Melissa Young-Duncan because he did not want to produce evidence of a firearm. He

feared the jury would have a basis to convict Mr. Bryant with manslaughter with a firearm which carried a mandatory minimum of five years as opposed to manslaughter without a firearm which carried a mandatory minimum of one year. 1/7/2005 Habeas Trial Tr. at 107. As the Connecticut Supreme Court aptly noted, defense counsel's explanation was based on hindsight and does not make sense considering the prosecution did not even allege that a firearm was ever used in the assault.

The excuses provided by the petitioner for defense counsel's omissions are disingenuous because he never interviewed any of the missing witnesses. He could not asses their importance because he did not know what evidence they could provide in support of the defense. "An attorney who fails to interview a readily available witness whose noncumulative testimony may potentially aid the defense should not be allowed to defend his omission simply by raising the shield of 'trial strategy and tactics.'" Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cir. 1984); see Wiggins v. Smith, 539 US 510 (2003); United States v. DeCoster, 487 F.2d 1197,1201 (CADC 1973); Smith v. Wainwright, 741 F.2d 1248, 1254 (11th Cir. 1984); Washington v. Smith, 219 F.3d 620, 631 (7th Cir. 2000). To hold otherwise would be to render Strickland moot.

The petitioner continues to assert unfounded, rejected, and unsupported arguments to obtain further judicial review. The Sixth Amendment and the Fourteenth Amendment to the United States Constitution, the holdings of this Court, and the trial record do not support the petitioner's arguments

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. The petitioner's claims are without merit.

RESPECTFULLY SUBMITTED,

THE RESPONDENT

Peter Tsimbidaros
Counsel of Record
Law Office of Peter Tsimbidaros
P.O. Box 320482
Fairfield, CT 06825
(203)333-5111

Dated: July 19, 2009

No. 09-84

In the

SUPREME COURT OF THE UNITED STATES

BRIAN K. MURPHY,
Petitioner

V.

BERNALE BRYANT,
Respondent

APPENDIX

APPENDIX
TABLE OF CONENTS

PAGE

STATUTORY PROVISIONS

General Statutes Section 53a-54a..... A-1

General Statutes Section 53a-55..... A-1

General Statutes Section 53a-55a..... A-2

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution.....A-2

Fourteenth Amendment to the United States Constitution..... A-2

Article First, Section 8 of the Connecticut Constitution..... A-2

DOCUMENTS

Petitioner's Exhibit 2 (Statement of Rene Fleury)..... A-4

Petitioner's Exhibit 4 (Statement of Melissa Young-Duncan..... A-6

Petitioner's Exhibit 1 (Statement of John Gartley)..... A-7

Petitioner's Exhibit 3 (Statement of Thomas Davis)..... A-9

Petitioner's Exhibit 6 (Statement of Jimmy Green)..... A-11

Petitioner's Exhibit 5 (Statement of Gloria Brown)..... A-13

Petitioner's Exhibit 9 (Note Authored by Ewan Sharp)..... A-15

STATUTORY PROVISIONS

General Statutes Section 53a-54a. Murder

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect, or other mental abnormality is admissible, in a prosecution under subsection (a) of this section, on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony or murder under section 53a-54d.

General Statutes Section 53a-55. Manslaughter in the first degree: Class B felony

(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause physical serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstance evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

(b) Manslaughter in the first degree is a class B felony.

General Statutes Section 53a-55a. Manslaughter in the first degree with a firearm: Class B felony: Five years not suspendable

(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, riffle or other firearm. No person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction but such person may be charged and prosecuted for both such offenses upon the same information.

(b) Manslaughter in the first degree with a firearm is a class B felony and any person found guilty under this section shall be sentenced to a term of imprisonment in accordance with subdivision (4) of section 53a-35a of which five years of the sentence imposed may not be suspended or reduced by the court.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article First, Section 8 of the Connecticut Constitution provides:

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witness against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty, or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger.

HARTFORD POLICE DEPARTMENT

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER: 96-16894

VOLUNTARY STATEMENT

DATE: 4-14-96

TIME STARTED: 1101 AM X PM

TIME FINISHED: 1250 AM PM X

I, RENE FLEURY (TYPE OR PRINT NAME IN FULL), of 52 PEARL STREET, MANCHESTER CT (TYPE OR PRINT FULL ADDRESS)

was born on 11-25-75 (MO. DAY YR) in WOBURN MASSACHUSETTS (TOWN/CITY STATE COUNTRY)

I attended 12 grades of school and I (XX) can ( ) can not read and write English. I have lived at my present address for 5 (YRS. MOS.). I am giving the following statement of my own free will and accord without fear, threat or promise.

This statement was given at 50 JENNINGS RD HARTFORD CT. (NO. STREET TOWN/CITY STATE)

I AM HERE AT THE HARTFORD POLICE STATION GIVING THIS STATEMENT TO DETECTIVE GRABOWSKI ABOUT THE INCIDENT THAT HAPPENED WITH MY CAR AND MY BOYFRIEND GARY FOURNIER ON SUNDAY MORNING 4-14-96

ON SATURDAY MORNING, I LEFT FOR WORK AT AROUND 8:00 AM. GARY MY BOYFRIEND WAS AT MY HOUSE STILL IN BED. I LEFT THE KEYS TO MY CAR AT THE HOUSE, BECAUSE GARY KNEW THAT IT WAS ALRIGHT TO USE MY CAR SATURDAY. I WENT TO WORK AT DENNY'S RESTURANT IN EAST HARTFORD. I GOT TO WORK USING MY FATHERS CAR. HE HAS A PONTIAC HORIZON COLOR WHITE.
MY CAR THAT GARY WAS USING WAS 1995 FORD ESCORT COLOR TEAL GREEN BUT IT LOOKS BLUE AT NIGHT. MY LICENSE NUMBER IS 713 KBX.

I WAS AT WORK UNTIL THREE IN THE AFTERNOON. GARY WAS AT WORK TO. HE WORKS FOR BARE NISSAN ON THE SERVICE ROAD IN HARTFORD. WHEN I GOT OUT OF WORK I WENT HOM AND WENT TO SLEEP. GARY WAS NOT HOME. I GOT UP 4:17 PM, I MADE DINNER FOR MYSEL I WATCHED TV, THEN I WENT TO MY PARENTS HOUSE AT 138 COOPER STREET IN MANCHES AROUND 9 OR 9:30 AT NIGHT. I STILL HAD NOT HEARD FROM MY BOYFRIEND GARY.

WELL, GARY DID CALL ME JUST BEFORE I LEFT FOR MY PARENTS HOUSE, AND TOLD ME THA HE WILL BE HOME SHORTLY. THAT GARY WAS AT THE WASHINGTON STREET SOCIAL CLUB IN MANCHESTER. I ARRIVED AT MY HOUSE BEFORE 10:00 PM. GARY WAS NOT HOME, AND I WE TO BED.

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

Det Stephen Grabowski
WITNESSED

Det Lisa J. M. Perreault 6205
WITNESSED

Rene Fleury
SIGNATURE

Sworn and subscribed to before me this 14th day of April 19 96 in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 (12/84) Page 1 of 2 Pages A-4 STATE'S ATTORNEY

BEST AVAILABLE COPY

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER
96-16894

(CONTINUATION) VOLUNTARY STATEMENT

DATE 4-14-96

AT 11: 20 AM DETECTIVE GRABOWSKI TOLD ME THAT HE RECIEVED WORD FROM THE MANCHESTER POLICE DEPARTMENT, THAT GARY WAS HOME AT 52 PEARL STREET. THEY ALSO TOLD ME THAT GARY HAD ACTIVE WARRANTS FROM THE EAST HARTFORD POLICE DEPARTMENT. I TRIED TO CALL MY HOUSE BUT NO ONE ANSEERED. I SIGNED A CONCENT TO SEARCh FORM IN FRONT OF HARTFORD POLICE SARGENT LILLEY, AND DETECTIVE GRABOWSKI. WE THEN LEF THE HARTFORD POLICE DEPARTMENT, TO PROCEED OVER TO MY HOUSE TO FIND GARY.

GARY WAS FOUND AT MY HOUSE WITH NO TROUBLE, AND MYSELFE AND DETECTIVE GRABOWSK AND SARGENT LILLEY RETURNED TO THE POLICE STATION TO GIVE MY STATEMENT.
I AM STARTING THIS STATEMENT WHERE I LEFT OFF ON PAGE 1.

I WOKE UP AT AROUND 5:15 OR 5:30 SUNDAY MORNING APRIL 14, 1996. I WAS NOT DUE IN WORK UNTIL 7:00 AM. AT 7:00 AM I WENT TO WORK. AT ABOUT 8:55 AM SOMEONE CAME IN THE RESTURANT, A FEMALE I HONESTLY DON'T KNOW WHO SHE WAS, SHE HAD BLONDE AHIR HAIR. SHE TOLD ME THAT GARY NEEDED TO TALK TO ME AND IT WAS IMPORTANT. I TOLD HER TO GO GET GARY SO WE CAN TALK AT THE COUNTER. SHE TOLD ME SHE COULD'T I TOLD HER IT'LL BE OUT IN A MINUTE. SHE TOLD ME GARY WAS OUTSIDE.
I WENT OUTSIDE AND SAW GARY SITTING IN A BROWN CAR, A OLDER CAR NOT A STATION WAGON. I ASKED HIM WHAT HAPPENED, HE TOLD ME HE WAS IN A CAR ACCIDENT AND WOULD EXPLAIN MORE LATER. AFTER THAT HE WENT INTO TOMS CAR, TOM HUGES WAS THE OTHER GUY AT MY HOUSE, TOM AND GARY LEFT, THEY TOLD ME THEY WERE GOING HOME.

I LEFT WORK AT AROUND 9:00 AM. I DROVE HOME. MY NEIGHBOR STEVE WHO LIVES ON THE FIRST FLOOR TOLD ME THAT THE POLICE WERE LOOKING FOR ME. I KNEW IT WAS ABOUT TH ACCIDENT. I WENT UP STAIRS TOLD GARY THAT I WAS GOING TO THE POLICE STATION, AN THAT I WOULD BE RIGHT BACK. HE TOLD ME TO THAT HE GAVE THE NAME LEONARD FOURNIER TO THE POLICE, BECAUSE HE HAD A WARRANT. SHE TOLDME IF THE POLICE ASK ABOUT THE CAR, TELL THEM I LEND IT TO LENNY FOURNIER. THEN DETECTIVE GRABOWSKI CALLED MI AT HOME. HE WAS HOME AT THE TIME. THEN I CAME INTO THE POLICE STATION TO TALI to detective grabowski.

BEFOR THE DETECTIVE CALLED GARY TOLD ME AS I WAS PUTTING HIM IN BED SOMETHING ABOUT 3 SPANISH GUYS WITH A GUN, BUT NOTHING MADE ANY SENSE TO ME. EVERY THING I TOLD DETECTIVE GRABOWSKI IS THE TRUTH.

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

WITNESSED

WITNESSED

SIGNATURE

Sworn and subscribed to before me this 14th day of April, 19 96, in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5A (10/84)

STATE'S ATTORNEY

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER 96-16894

VOLUNTARY STATEMENT

DATE 4-14-96

TIME STARTED 0350 AM ☒ PM

TIME FINISHED 0430 AM ☒ PM

I, Melissa Young (TYPE OR PRINT NAME IN FULL), of 873 West Blvd Apt 308 Hfd CT (TYPE OR PRINT FULL ADDRESS)

was born on 1 4 69 (MO DAY YR) in New Britain (TOWN/CITY) CT (STATE) USA (COUNTRY)

I attended 12 grades of school and I (X) can ( ) can not read and write English. I have lived at my present address for 2 (YRS.) - (MOS.). I am giving the following statement of my own free will and accord without fear, threat or promise.

This statement was given at SFH 114 (NO.) Woodland St (STREET) Hfd (TOWN/CITY) CT (STATE)

I am A employee of L+M Ambulance & on 4-14-96 At approx 130AM John Gaffney & myself responded to an MVA on Albany & Irving St. U.O.A found 2 CARS, one CAR facing west, the other CAR was Against telephone pole facing north on Irving St. My partner went to CAR on Albany to check injuries & I went to the CAR on Irving. I found A white male PT laying on ground on front right side in fetal position facing North on Irving. PT was surrounded by About 10 black bystanders, one black female had just moved away from him & told me she felt no pulse. I immediately went back to Ambulance to get equipment & called for Assistance from John. PT had what to appeared to be A gunshot wound At Left temple Area. We started to remove clothing & on the back of PT he had A 5 inch oblong [redacted] contusion on upper center of back & several Abrasions on lower BACK. We turned PT over & he had Severe facial trauma & Abrasions on chest & Abd. While doing this we were Also Asking bystanders if Anyone witness Accident OR if PT was taken out of CAR by them. They all denied. Officer Manning WAS 1st officer that was on scene & we told him what we had & proceeded to load PT into Ambulance. Officer Perri came into ambulance with us & As we were doing ALS procedures he Assist us by trying to find PT info & Asking us what we had. Our Supervisor Mike R. drove the Ambulance over to SFH report of injuries given to SFH ED staff.

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 1 pages.

Det Lux St Pierre 61207
WITNESSED

WITNESSED

Melissa
SIGNATURE

Sworn and subscribed to before me this 14th day of April, 1996, in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 (12/84)

Page 1 of 1 Pages

A-6

STATE'S ATTORNEY

HARTFORD POLICE DEPARTMENT

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER: 96-16894

VOLUNTARY STATEMENT

DATE: 04-14-96

TIME STARTED	AM	PM
0354	X	

TIME FINISHED	AM	PM
0442	X	

I, John C Gartley (TYPE OR PRINT NAME IN FULL), of 40 Timber ha. Windsor Ct. 06095 (TYPE OR PRINT FULL ADDRESS)

was born on 11 (MO.) 12 (DAY) 62 (YR.) in Honolulu (TOWN/CITY) Hawaii (STATE) USA (COUNTRY)

I attended 13 grades of school and I (✓) can ( ) can not read and write English. I have lived at my present address for 2 (YRS.) ___ (MOS.). I am giving the following statement of my own free will and accord without fear, threat or promise.

This statement was given at 114 (NO.) Woodland St (STREET) Hartford (TOWN/CITY) Ct (STATE)

On 14 April 1996 at 0133hrs my unit (H63) was dispatched by Hartford Police to the intersection of Albany Ave. and Irving St in Hartford for a motor vehicle accident. Upon our arrival at 0134hrs found 1 vehicle, a blue Bronco type truck, facing west on Albany Ave. and vehicle facing north on the east side walk of Irving St with driver side of the front quarter against a telephone pole. I also noted 20 or more bystanders around the Irving St car.

I sent my partner to the Irving St car while I attended to triage the scene. I found the driver of the truck complaining of side pain, the other occupant had no complaints and was on the radio to his office. Upon returning to the Irving St car I found a patient white male lying on his right side facing north and head pointing east. This patient showed multiple contusions to his face with heavy blood loss and had what appeared to be a gun shot wound above his left ear. Small amounts of brain matter was scattered about his hair and face. This patient had no pulse or respirations. I asked the bystanders "if anyone knew how he got to be in this position" and "if anyone else was in the vehicle" but no answers given. continued on page 2

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

Det Lisa St Aime 6120?
WITNESSED

WITNESSED

John C Gartley
SIGNATURE

Sworn and subscribed to before me this 14th day of April 1996, in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 (12/84)

STATE'S ATTORNEY

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER 96-16894

(CONTINUATION)

VOLUNTARY STATEMENT

DATE 04-14-96

Noting the condition of this patient I advised the dispatcher that it may possibly be a 10-45 and to dispatch the Hartford Fire Department Tactical unit for possible extrication of the other vehicle. I also notified the first HPD officer I saw that there may be a gunshot wound.

I used trauma shears to cut the patients jacket and T-Shirt up the back to expose the patients back before mooving him. I saw multiple red marks along both flanks and one to the right medial shoulder blade - mid-sagittal direction in oval 5 inches long by 3 inches wide. With my partner holding cervical spine control we log rolled the patient into a supine position on a back board. a cervical collar was then applied. I now noted a large amount of blood and a large clot of blood where the Right side of the patient's head was resting on the side walk. the patient was placed on the stretcher and mooved into the ambulance.

Upon further examination of the patient showed multiple facial fractures, heavy blood in the mouth and oropharynx, multiple contusions to back, abdomen the patient still had no pulse but had some electrical activity on the monitor. I attempted to place an endotracheal tube but was unsuccessful. A first attempt at IV access on the left arm was unsuccessful. An IV was established on the Right arm. CPR was established with noted ease of compressions due to chest fractures. A police officer rode along with us to the hospital and helped tape down the Right arm IV. We left the scene at 0148 hrs.

The patient was delivered to the Trauma Team at St Francis Hospital at 0145 hrs. A verbal report was given to the Trauma doctors. No further contact was made with the patient until about 0345 hr when the discussion of the scene and patient was conducted with the HPD officers at St Francis and this statement was written. JRF

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

Det Lucas G Russ 61207
WITNESSED

WITNESSED

SIGNATURE

Sworn and subscribed to before me this 14th day of April, 1996 in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 A (12/84)

Page 2 of 2 Pages

A-8

STATE'S ATTORNEY

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER: 96-16894

VOLUNTARY STATEMENT

DATE: 4-14-96

TIME STARTED	AM	PM
5;50	XXX	

TIME FINISHED	AM	PM
7;05	XXX	

I, THOMAS DAVIS (TYPE OR PRINT NAME IN FULL), of 929 BURNSIDE AVENUE EAST HARTFORD C (TYPE OR PRINT FULL ADDRESS)

was born on 11 15 74 (MO. DAY YR.) in MANCHESTER (TOWN/CITY) CONN. (STATE) U.S.A. (COUNTRY)

I attended GED grades of school and I (XX) can ( ) can not read and write English. I have lived at my present address for 2 (YRS. MOS.). I am giving the following statement of my own free will and accord without fear, threat or promise.

This statement was given at 50 (NO.) JENNINGS (STREET) RD. HARTFORD (TOWN/CITY) CONN. (STATE)

ON 4-14-96 AT APPROXIMATELY 5;50 A.M. DETECTIVE KNIGHT FROM THE HARTFORD POLICE DEPARTMENT CAME TO MY HOUSE LOCATED AT 929 BURNSIDE AVENUE EAST HARTFORD CONN. ACCOMPANIED BY THREE EAST HARTFORD POLICE OFFICERS.

I WAS INVOLVED IN A SERIOUS ACCIDENT IN HARTFORD CONN. AT THE INTERSECTION OF ALBANY AVENUE AND IRVING ST. IT WAS AFTER 1;00 IN THE MORNING ON 4-14-96. DETECTIVE KNIGHT ASKED ME TO COME TO THE HARTFORD POLICE DEPARTMENT AND GIVE A INTERVIEW AS TO WHAT HAPPENED.

DETECTIVE KNIGHT DID READ ME MY CONSTITUTIONAL RIGHTS PRIOR TO THE INTERVIEW WHICH I VOLUNTARILY WAIVED WITHOUT FEAR OR PROMISE MADE TO ME. I AM AWARE THAT THE DRIVER OF THE OTHER VEHICLE INVOLVED IN THE ACCIDENT HAS DIED.

I AM EMPLOYED BY THE METRO LOST PREVENTION SERVICES LOCATED AT 98 CEDAR ST. IN HARTFORD CONN. I AM A SUPERVISOR AND CURRENTLY SUPERVISES TWENTY SECURITY OFFICERS ON MY SHIFT. ON THIS DATE 4-14-96 AT APPROXIMATELY 1;00 IN THE MORNING I CAME FROM NUMBER 12 VINE ST. THE HORACE BUSHNELL APARTMENTS TO CHECK ON OFFICER GLORIA BROWN AND OFFICER GREEN.

I WAS OPERATING A CHEVY BLAZER 4x4 LICENSE PLATE NUMBER IS CONN. 943-HUH.

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

Det K. Knight
WITNESSED

WITNESSED

Thomas Davis
SIGNATURE

Sworn and subscribed to before me this 14th day of April, 19 96, in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 (12/84)

STATE'S ATTORNEY

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER 96-16894

(CONTINUATION) **VOLUNTARY STATEMENT**

DATE 4-14-96

AFTER CHECKING ON THE OFFICERS I PROCEEDED SOUTH ON VINE ST. TO ALBANY AVENUE, I TURNED EAST ONTO ALBANY AVENUE WAS TRAVELING APPROXIMATELY 35 TO 40 MILES AN HOUR. I REACHED IRVING ST. AND A DARK COLORED VEHICLE I THINK IT WAS BLACK CAME TRAVELING OUT OF IRVING STREET NORTH ACROSS ALBANY AVENUE AT A HIGH RATE OF SPEED I WOULD SAY IN EXCESS OF 60 MILE AN HOUR INTO MY PATH, I WAS UNABLE TO AVOID CONTACT WITH THIS VEHICLE AND CONSEQUENTLY WE COLLIDED RESULTING IN MY VEHILCE SPINNING AROUND AND THE DARK COLORED VEHICLE WAS HIT ON THE DRIVERS SIDE OF THE VEHICLE AND THE DARK COLORED VEHICLE CAME TO REST ON THE NORTESIDE CURB OF ALBANY AVENUE AFTER STRIKING A UTILITY POLE.

I WAS UNABLE TO GET OUT OF MY VEHICLE AND I SUSTAINED INJURIES TO MY LEFT KNEE AND LEFT HAND (THUMB), I OBSERVED THE PASSENGER SIDE CAR DOOR OF THE VEHICLE I STRUCK OPEN AND OBSERVE SOMEONE EXIT THE VEHILCE AND STAGGER WEST ON ALBANY AVENUE FOR APPROXIMATELY TWENTY FEET BEFORE FALLING TO THE GROUND. A CROWD OF PEOPLE HAD GATHERED AROUND.

I [illegible]OIED SECURITY OFFICERS LOCATED AT VINE AND ALBANY AVENUE AND INFORMED THEM THAT I WAS INVOLVED IN A ACCIDENT AT THE INTERSECTION OF ALBANY AVENUE AND IRVING ST. SECURITY OFFICER GLORIA BROWN CAME TO MY VEHILCE AND SECURITY OFFICER GREEN WENT TO THE OTHER VEHICLE TO OFFER SOME ASSISTANCE.

OUR DISPATCHER FOR THE SECURITY COMPANY PHONE THE POLICE AND THE FIRE DEPARTMENT AND NOTIFIED THEM OF THE ACCIDENT. THE FIRE DEPARTMENT ALONG WITH THE POLICE ARRIVED AND I WAS UNABLE TO GET OUT OF THE VEHICLE AND THE FIRE DEPARTMENT EXTRICATED ME OUT OF THE VEHICLE BY PRYING THE DRIVER SIDE DOOR OPEN.

PROFESSIONAL AMBULANCE THAT HAD ARRIVED TRANSPORTED ME TO ST. FRANCIS HOSPITAL WHERE I WAS TREATED AND RELEASED.

AT THE TIME OF THE ACCIDENT I WAS THE ONLY OCCUPANT IN MY VEHICLE IT WAS SUGGESTED THAT I MIGHT HAD SOMEONE ELSE IN MY VEHICLE WHICH WAS FALSE, THE SECURITY OFFICERS NEAR MY VEHICLE WHEN THE AMBULANCE ARRIVED WERE NOT PASSENGERS IN MY VEHICLE BUT ARRIVED AFTER THE ACCIDENT TO OFFER ASSISTANCE.

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

Det. K. Knight
WITNESSED

WITNESSED

Thomas Davis
SIGNATURE

Sworn and subscribed to before me this 14th day of April, 1996, in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 A (12/84)

HARTFORD POLICE DEPARTMENT

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER: 96-16694

VOLUNTARY STATEMENT

DATE: 4-14-96

TIME STARTED: 1;45 AM PM XX

TIME FINISHED: 2;30 AM PM XX

I, JIMMY GREEN (TYPE OR PRINT NAME IN FULL) of 57 SUMNER ST. HARTFORD CONN. (TYPE OR PRINT FULL ADDRESS)

was born on 8 (MO.) 9 (DAY) 73 (YR.) in SEATTLE (TOWN/CITY) WASHINGTON (STATE) U.S.A. (COUNTRY)

I attended 14 grades of school and I (X) can ( ) can not read and write English. I have lived at my present address for 8 (YRS. - MOS.). I am giving the following statement of my own free will and accord without fear, threat or promise.

This statement was given at 50 (NO.) JENNINGS (STREET) RD. HARTFORD (TOWN/CITY) CONN. (STATE)

ON 4-14-96 AT APPROXIMATELY 1;45 I CAME TO THE HARTFORD POLICE DEPARTMENT TO SPEAK WITH THE POLICE REGARDING A SERIOUS ACCIDENT INVOLVING MY FIELD SUPERVISOR FOR METRO LOST PREVENTION SECURITY COMPANY WHICH I AM AN EMPLOYEE.

AT APPROXIMATELY 1;35 GLORIA BROWN AND MYSELF WERE ON ROUTINE PATROL ONVINE ST. WHEN I RECEIEVED A RADIO TRANSMISSION FROM MY FIELD SUPERVISOR THOMAS DAVIS, THOMAS STATED" HE NEEDED HELP AND THAT HE HAD JUST GOT INTO AN ACCIDENT WITH ANOTHER VEHICLE AT THE INTERSECTION OF ALBANY AVENUE AND [illegible]VING ST.

GLORIA AND MYSELF RAN TO THE SCENE WHERE THE ACCIDENT WAS AND GLORIA WENT AND ATTENDED TO THE THOMAS DAVIS WHO WAS OPERATING OUR SECURITY BLAZER. I OBSERVED THE BLAZER WITH FRONT END DAMAGE AND FACING WEST IN THE MIDDLE OF ALBANY AVENUE.

I ALSO OBSERVED A BLUISH GREEN FORD ESCORT VEHICLE WITH MAJOR DRIVER SIDE DAMAGE THAT CAME TO REST ON THE NORTH CURB OF ALBANY AVENUE AFTER STRIKING A TELEPHONE POLE. I WENT OVER TO THE VEHICLE TO RENDER SOME ASSISTANCE AFTER OBSERVING A WHITE MALE STAGGER FROM THE VEHICLE.

I OBSERVED A SECOND WHITE MALE LYING ON THE GROUND BLEEDING PROFUSELY

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

WITNESSED

WITNESSED

SIGNATURE

Sworn and subscribed to before me this 14th day of April, 1996, in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 (12/84) Page 1 of 2 Pages

A-11

STATE'S ATTORNEY

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER 96-16894

(CONTINUATION) VOLUNTARY STATEMENT

DATE 4-14-96

FROM THE HEAD AND FACE AREA. WHEN I FIRST ARRIVED THERE WERE APPROXIMATELY TWENTY PEOPLE AROUND THE ACCIDENT VICTIM LYING ON THE GROUND. IWENT TO SPEAK WITH THE WHITE MALE THAT HAD STAGGER OUT OF THE VEHICLE ON TEE PASSENGER SIDE. I SPOKE WITH THIS WHITE MALE WHO STATED THAT THE LAST THING HE REMEMBER WAS SOME PEOPLE SAYING GIVE US OUR MONEY, AFTER THAT THE WHITE MALE REMEMBER HIS FRIEND PULL OFF AND THAT ALL THE WHITE MALE COULD REMEMBER.

THE CROWD ENTICE ME TO GIVE MORE ATTENTION TO THE VICTIM ON THE GROUND AND I HAD SOME RUBBER GLOVES AND TRIED TO FEEL FOR A PULSE ON THE VITIM ON THE GROUND BUT COULD NOT FIND ONE.

THE POLICE AND FIRE DEPARTMENT ARRIVED AND GAVE IMMEDIATE MEDICAL TO THE VICTIM THAT WAS HURT THE MOST SERIOUS AND TRANSPORTED TO ST. FRANCIS HOSPITAL.

WE ATTEMPTED TO SEEK INFORMATION FROM THE CROWD BUT RECEIVED NO COOPERATION AND NO ONE CAME FORWARD. WE THEN WENT TO SEE ABOUT THE FEILD SUPERVISOR THOMAS DAVIS, WHO HAD TO BE EXTRACTED FROM THE BLAZER BY THE FIRE DEPARTMENT AND THEN TRANSPORTED TO THE HOSPTAL FOR MEDICAL TREATMENT OF HIS LEFT LEG AND ARM.

I DID NOT SEE ANYONE AROUND THE VICTIM WITH ANY WEAPONS OR SEE ANYONE BEATING THE VICTIM THAT WAS LYING ON THE GROUND.

JLG

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages

WITNESSED

WITNESSED

SIGNATURE

Sworn and subscribed to before me this 14th day of April, 19 96, in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5 A (12/84)

STATE'S ATTORNEY

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER: 96-16894

VOLUNTARY STATEMENT

DATE: 4-14-96

TIME STARTED: 8;15 AM XX PM

TIME FINISHED: 9;00 AM XX PM

I, GLORIA BROWN (TYPE OR PRINT NAME IN FULL), of 22 GRAY ST. HARTFORD CONN. (TYPE OR PRINT FULL ADDRESS)

was born on 1 (MO.) 27 (DAY) 71 (YR.) in SAN ANTONIO (TOWN/CITY) TEXAS (STATE) U.S.A. (COUNTRY)

I attended 12 grades of school and I (XX) can ( ) can not read and write English. I have lived at my present address for 1 YRS. ____ MOS. I am giving the following statement of my own free will and accord without fear, threat or promise.

This statement was given at 50 (NO.) JENNINGS (STREET) RD. HARTFORD (TOWN/CITY) CONN. (STATE)

ON 4-14-96 AT APPROXIMATELY 8;15 A.M. I CAME TO THE HARTFORD POLICE DEPARTMENT TO SPEAK WITH THE POLICE REGARDING A SERIOUS ACCIDENT THAT INVOLVED MY FIELD SUPERVISOR THOMAS DAVIS WHO WORKS FOR METRO LOST PREVENTION SERVICES WHERE I AM EMPLOYED AS SECURITY OFFICER.

AT APPROXIMATELY 1;30 A.M. I RECEIVED A RADIO DISPATCH ALONG WITH SECURITY OFFICER JAMES GREEN FROM OUR FIELD SUPERVISOR WHO STATED THAT HE WAS INVOLVED IN A MOTOR VEHICLE ACCIDENT AND THAT A VEHICLE RAN THE STOP SIGN AT THE INTERSECTION OF ALBANY AVENUE AND IRVING STREET AND THAT HE NEEDED ASSISTANCE.

JAMES GREEN AND MYSELF RAN FROM 30 VINE ST. TO THE INTERSECTION OF ALBANY AVENUE AND IRVING ST. UPON ARRIVAL I OBSERVED THE COMPANY SECURITY BLAZER WITH BADLY FRONT END DAMAGE, I WENT AROUND TO THE DRIVER'S SIDE DOOR AND ASKED SUPERVISOR DAVIS IF HE WAS ALL RIGHT AND ATTEMPTED TO OPEN THE DOOR BUT WAS UNABLE TO DO SO BECAUSE THE DOOR WAS JAMMED SHUT.

SECURITY JAMES GREEN WENT TO ASSIST THE MOTORIST IN THE OTHER VEHICLE THAT WAS SEVERELY DAMAGE, AND ONE OF THE OCCUPANTS HAD EXITED THAT VEHICLE AND WAS LYING ON THE GROUND FACE UP BLEEDING PROFUSELY FROM THE HEAD AREA.

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, I will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

WITNESSED

WITNESSED

SIGNATURE

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NOTARY PUBLIC

STATE OF CONNECTICUT
COUNTY OF HARTFORD
CITY OF HARTFORD

CASE NUMBER 96-162854

(CONTINUATION) **VOLUNTARY STATEMENT**

DATE 4-14-96

THERE WAS A LARGE CROWD THAT HAD GATHERED BUT NO ONE SAID THEY SAW ANYTHING. I REMAINED WITH SUPERVISOR DAVIS AND HE ASKED ME TO REMOVE A BOX OF KEYS BELONGING TO THE OTHER SECURITY LOCATIONS AND TWO NOTEBOOKS AND A SECURITY RADIO FROM THE BLAZER AND I GAVE THEM TO MR. LEROY CAMPBELL WHO IS ONE OF THE OWNERS OF THE COMPANY, WHO HAD ARRIVED AT THE SCENE AFTER BEING NOTIFIED BY OUR DISPATCHER.

THE POLICE AND THE FIRE DEPARTMENT ARRIVED AT THE SCENE AND SECURED THE SCENE, THE FIRE DEPARTMENT PRIED THE DRIVER SIDE DOOR OF THE BLAZER OPEN SO THE AMBULANCE PEOPLE COULD ADMINISTER MEDICAL TREATMENT TO SUPERVISOR DAVIS.

THE AMBULANCE HAD ALREADY TAKEN THE OCCUPANTS OF THE OTHER VEHICLE AWAY IN THE AMBULANCE, I WAS UNAWARE THAT SOMEONE HAD DIED IN THE ACCIDENT UNTIL SUPERVISOR DAVIS CALLED ME FROM THE HARTFORD POLICE DEPARTMENT AT APPROXIMATELY 7;45 A.M. THIS DATE 4-14-96 AND INFORMED ME THAT ONE OF THE OCCUPANTS FROM THE OTHER VEHICLE HAD DIED.

I KNEW THE PERSON THAT HAD EXITED THE VEHICLE WAS SERIOUSLY INJURED BECAUSE OF THE BLOOD LOST THAT I OBSERVED AND SECURITY OFFICER GREEN HAD STATED THAT HE ATTEMPTED TO LOCATE A PULSE ON THAT PERSON AND COULD NOT FIND ONE PRIOR TO THE AMBULANCE ARRIVED.

I have read (or have had read to me) the above statement and it is true to the best of my knowledge. I fully understand that if I knowingly make a statement that is untrue and which is intended to mislead a law enforcement officer in the performance of his official function, it will be in violation of Section 53a-157 of the Connecticut General Statutes, False Statement.

This statement consists of 2 pages.

WITNESSED

WITNESSED

SIGNATURE

Sworn and subscribed to before me this 14th day of April 19 96 in accordance with the Connecticut General Statutes.

NOTARY PUBLIC

HPD FORM 5A (12/84)

STATE'S ATTORNEY

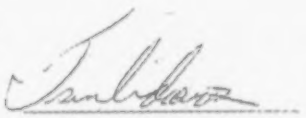
A Yo' cuzin

Whats done is done. If I wasn't fuck up in the Head
off that shit it wouldint have never happened. I got
set up for the dry coke by them snake ass homicides
it ain't nothing dough. If I wouldve charge it or
said I need the would've gave me 12 but it ain't
about that. I feel for You. I wouldve gave you the
names that put me in it in the first place but I
can't that's irrelevant. You put my name out
as Dontin fuck up cuzin it all good cuzin
You gotta keep screamin mines.

Grant PETITIONER'S EXHIBIT
CV03-3933
9 1-7-05

CERTIFICATION OF WORD LIMIT

The undersigned attorney hereby certifies that the word and page limits have not been exceeded in the Brief in Opposition to Petition for Certification in the matter of Brian K. Murphy v. Bernale Bryant. The undersigned hereby certifies that 8,024 words used.

BY: 

Peter Tsimbidaros